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JUDICIAL COMPARATIVISM AND JUDICIAL DIPLOMACY

DAVID S. LAW[†]

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[†] Professor of Law and Professor of Political Science, Washington University in St. Louis; Martin and Kathleen Crane Fellow in Law and Public Affairs, Princeton University. This Article has benefited from the exceptional work of the editors of the *University of Pennsylvania Law Review*. Portions of Sections IV.D and IV.E are adapted from an article co-authored with Wen-Chen Chang entitled *The Limits of Global Judicial Dialogue*, which appeared in 2011 in the *Washington Law Review*. That material is incorporated here with the blessing of Professor Chang, to whom I remain deeply indebted. Earlier versions of this Article were presented at faculty workshops at American University, Fordham Law School, Tulane Law School, the University of San Diego, Washington University in St. Louis, and Whittier Law School; the Comparative Constitutional Law Roundtable at the George Washington University Law School; the Centre for Comparative and Public Law at the University of Hong Kong; and the Centre for Public Governance and Law at Yonsei Law School. I am deeply grateful to Miri Joo, Chien-Chih Lin, Sachiyo Miller, HyunTae Roh, Norimitsu Shirai, Ethan Brandt, Hyun Jin Chung, and Ho Jun Yang for indispensable research assistance in a variety of languages; to the Center for Empirical Research in the Law at Washington University in St. Louis for funding the translation of Korean-language materials; and to Francesca Bignami, Cora Chan, Tom Clark, Erin Delaney, Martin Flaherty, David Fontana, Martin Gelter, Danny Gittings, Oren Gross, Chaihark Hahm, Johanna Kalb, Ken Kersch, David Kosar, Ron Krotoszynski, Chulwoo Lee, Keun-Gwan Lee, Tom Lee, Jeffrey Lubbers, Manoj Mate,

By global standards, the U.S. Supreme Court is unusual in a number of respects, but one of its most distinctive characteristics is its reluctance to engage in comparative constitutional analysis. Much has been said on the normative question of whether and in what ways the Court ought to make use of foreign constitutional jurisprudence. Rarely, however, do scholars broach the underlying empirical question of why some courts make greater use of foreign law than others.

To identify the causes of comparativism, a behind-the-scenes investigation was conducted of four leading courts in East Asia: the Japanese Supreme Court, the Korean Constitutional Court, the Taiwanese Constitutional Court, and the Hong Kong Court of Final Appeal. The results of this investigation highlight the crucial role of institutional and resource constraints in shaping judicial behavior but also pose an unexpected challenge to traditional conceptions of the role and function of constitutional courts.

Evidence from interviews conducted with numerous justices, clerks, and senior administrators suggests that a combination of mutually reinforcing factors creates the conditions necessary for comparativism to thrive. The first factor is institutional capacity. A court that lacks institutional mechanisms for learning about foreign law, such as the recruitment of law clerks with foreign legal expertise or the use of researchers who specialize in foreign law, is unlikely to make more than sporadic use of foreign law. The second factor is legal education. Even the most elaborate of institutional mechanisms for facilitating comparativism is unlikely to be effective unless it is backed by a system of legal education that produces an adequate supply of lawyers with both an aptitude and appetite for comparativism.

Investigation of the reasons for which courts engage in comparativism also reveals a hidden underlying phenomenon of judicial diplomacy. Unlike other judicial practices such as textualism or originalism, comparativism is not merely a means by which judges perform legal and adjudicative functions; it can also be a form of diplomatic activity. When constitutional courts demonstrate mastery of foreign law or host foreign judges, their goals may not consist exclusively, or even primarily, of writing stronger opinions or winning over domestic audiences. They may also be competing with one another for international influence or pursuing foreign policy objectives, such as promotion of the rule of law and judicial independence in other countries. The concept of judicial diplomacy helps to explain why constitutional courts engage in a number of practices that are only tenuously related

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to the act of adjudication. Although the U.S. Supreme Court rarely practices constitutional comparativism, it is an active practitioner of judicial diplomacy in other forms.

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INTRODUCTION: THE DIVIDE BETWEEN AMERICAN AND GLOBAL CONSTITUTIONALISM

By global standards, American constitutionalism is unusual—or, as some prefer to say, exceptional¹—in many respects. Much of what makes it so atypical can be traced directly to the U.S. Constitution itself. The Constitution is very old. It is also very rarely amended. The average constitution has a 38% chance of being revised in any given year and is replaced every nineteen years.² The U.S. Constitution, by contrast, is the oldest surviving constitution in the world.³ It has lasted twelve times longer than the average constitution, and it has not been amended in over twenty years.⁴

¹ See Steven G. Calabresi, *"A Shining City on a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1405-11 (2006) (discussing various features of American constitutional law that "explicitly reflect the extent to which America is an exceptional nation, different from any other," and describing the Constitution itself as "the focal point of American exceptionalism," "our holiest of holies," and "our ark of the covenant"); David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 854 (2012) (discussing the view that the U.S. Constitution "lies at the very heart of an 'American creed of exceptionalism,' which combines a belief that the United States occupies a unique position in the world with a commitment to the qualities that set the United States apart from other countries").

² See ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 101, 129 (2009) (calculating a mean "predicted amendment rate" of 0.38 per year and a median lifespan of nineteen years for the world's constitutions).

³ See Law & Versteeg, *supra* note 1, at 852-53.

⁴ The most recent amendment, the Twenty-Seventh Amendment, was adopted in 1992 and stands as an object lesson in the difficulty of amending the U.S. Constitution: over two hundred years elapsed between its proposal and its ratification. See David S. Law & David McGowan, *There Is Nothing Pragmatic About Originalism*, 102 NW. U. L. REV. COLLOQUY 86, 93 & n.34.

Whether one considers these characteristics of longevity and stability praiseworthy—and some do not⁵—they have as a purely empirical matter rendered the Constitution increasingly out of sync with the global mainstream. Since World War II, constitutional drafting around the world has become characterized by the widespread adoption of a core set of generic constitutional rights that extend beyond the negative civil and political liberties found in the Bill of Rights.⁶ The U.S. Constitution, a relic of the late eighteenth century, has not partaken of these trends. Instead, it omits a significant number of provisions that have become highly popular, while including others that have become highly atypical.⁷

(2007) (using the history of the Twenty-Seventh Amendment to illustrate the difficulty of adopting even the most popular of constitutional amendments).

⁵ See, e.g., SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 9 (2006) (arguing that the U.S. Constitution has become “significantly dysfunctional” to the point of warranting a constitutional convention); LARRY J. SABATO, *A MORE PERFECT CONSTITUTION: 23 PROPOSALS TO REVITALIZE OUR CONSTITUTION AND MAKE AMERICA A FAIRER COUNTRY* 4-5 (2007) (bemoaning the “political ossification” and “grotesque” inequities that have resulted from failure to engage in more than “insufficient tinkering” with the Constitution over the last two centuries); Michael Ignatieff, *Introduction: American Exceptionalism and Human Rights* (dubbing the U.S. Bill of Rights “a late eighteenth-century constitution surrounded by twenty-first-century ones, a grandfather clock in a shop window full of digital timepieces”), in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 1, 11 (Michael Ignatieff ed., 2005).

⁶ See, e.g., Philip Alston, *A Framework for the Comparative Analysis of Bills of Rights* (enumerating a “core set of civil and political rights which is reflected almost without fail” in new national constitutions and international human rights instruments alike), in *PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES* 1, 2 (Philip Alston ed., 1999); David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163, 1200-01 (2011) (identifying the twenty-five most “generic” rights-related constitutional provisions in the world, and documenting their rise in popularity from 1946 through 2006); Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499, 501 (2000) (observing that most post-war constitutions combine distinctive elements with a “common core of human rights provisions that are strikingly similar”).

⁷ See Law & Versteeg, *supra* note 1, at 804-06 (identifying the most “generic” rights-related provisions found in constitutions, and documenting the extent to which the U.S. Constitution both omits highly popular provisions and includes highly unpopular provisions); see also, e.g., Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 395, 399 (2008) (noting that the sheer age and “correspondingly anachronistic concerns” of the Constitution, and “its comparatively few enumerated rights,” “especially of a substantive rather than a procedural nature,” all stand in “marked contrast to [the] paradigmatic post-1945, rights-protecting constitutions” prevalent elsewhere in the world); Ignatieff, *supra* note 5, at 10 (noting that the U.S. Constitution is atypical in its omission of socioeconomic and welfare rights, its phrasing of rights in negative terms, and its inclusion of rights that “do not feature in other democratic systems,” such as the right to bear arms); Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?* (deeming the U.S. Constitution “distinctive” in its omission of social and economic rights), in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS*, *supra* note 5, at 90, 92.

Other odd features of American constitutionalism are attributable not to the Constitution, but rather to the Supreme Court. Interpretive and argumentative approaches popular in the United States barely register in other countries, and vice versa. For example, originalism has become a fixture of judicial, academic, and even popular debate in the United States⁸ but, as a former Canadian Supreme Court justice has observed, it is “simply not the focus, or even a topic, of debate elsewhere.”⁹

As distinctive as the presence of originalism, however, is the absence of comparativism.¹⁰ It is difficult to identify a national high court that pays less attention to foreign constitutional jurisprudence than the U.S. Supreme Court.¹¹ Indeed, the Court’s reluctance to engage foreign courts in a “global

⁸ See, e.g., Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 10-12 (2009) (describing “the elevated space originalism occupies within American legal and political culture”).

⁹ Claire L’Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 33 (1998) (arguing that the U.S. Supreme Court’s “international impact” has diminished due in part to its preoccupation with originalism); see also, e.g., Greene, *supra* note 8, at 3-6 (discussing the “global rejection of American-style originalism”); Ozan O. Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 VAND. J. TRANSNAT’L L. 1239, 1242, 1262-77 (2011) (noting the “prevailing view” that “originalism is primarily an American obsession,” and discussing at length the rare counterexample of the Turkish Constitutional Court’s use of originalist reasoning to defend a strict separation of church and state). Although it is an overstatement to say that originalism is not discussed anywhere else in the world, Justice L’Heureux-Dubé’s assessment is not terribly far off the mark. Singapore, Malaysia, and to some extent Australia are rare examples of countries other than the United States where originalist arguments are frequently encountered. See PO JEN YAP, *CONSTITUTIONAL DIALOGUE IN COMMON LAW ASIA* (forthcoming 2015) (manuscript at 262-66) (on file with author) (discussing the espousal of “hard originalism” in Singapore); Yvonne Tew, *Originalism at Home and Abroad*, 52 COLUM. J. TRANSNAT’L L. 780, 783-84 (2014) (listing Malaysia, Turkey, Singapore, Australia, and the United States as countries where some form of originalist methodology has taken hold).

¹⁰ See, e.g., Ignatieff, *supra* note 5, at 1, 8-10, 14 (identifying “legal isolationism,” or the unwillingness of American judges to consider “foreign human rights precedents,” as a form of “American exceptionalism” in the area of human rights, and observing that “[i]n the messianic American moral project, America teaches the meaning of liberty to the world; it does not learn from others”); Frank I. Michelman, *Integrity-Anxiety?* (“[E]xceptional reluctance by the American judiciary to pay heed to foreign constitutional law may seem . . . both the toughest to explain and the most embarrassing of all the types of U.S. exceptionalism in the field of human rights . . .”), in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS*, *supra* note 5, at 241, 244.

¹¹ See, e.g., MICHAL BOBEK, *COMPARATIVE REASONING IN EUROPEAN SUPREME COURTS* *passim* (2013) (canvassing the ways in which high courts throughout Europe make use of foreign law); RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* *passim* (2014) (discussing the frequency with which the Canadian Supreme Court and South African Constitutional Court, among others, cite foreign law); BASIL MARKESINIS & JÖRG FEDTKE, *JUDICIAL RECOURSE TO FOREIGN LAW: A NEW SOURCE OF INSPIRATION?* 61-108 (2006) (surveying judicial use of foreign law in Italy, France, England, Germany, Canada, and South Africa); *THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES* *passim* (Tania Groppi & Marie-Claire Ponthoreau eds., 2013) (surveying the use of foreign precedent by constitutional courts in sixteen countries, including the United States); Ursula Bentele, *Mining for Gold: The Constitutional Court of South Africa’s Experience with Comparative*

judicial dialogue”¹² on matters of common concern has itself become an object of criticism from both foreign jurists¹³ and members of the Court

Constitutional Law, 37 GA. J. INT’L & COMP. L. 219, 227, 244 (2009) (reporting that over half of the South African Constitutional Court’s decisions over the preceding fourteen years cited foreign law, and that “the justices have the benefit of up to five clerks selected from applicants around the world”); Brun-Otto Bryde, *The Constitutional Judge and the International Constitutionalist Dialogue* (noting on the basis of personal experience as a member of the German Constitutional Court that foreign decisions are consulted “extensively,” and that it is standard for the preparatory materials relied upon by the Court to incorporate any relevant comparative literature that is available in German), in JUDICIAL RECOURSE TO FOREIGN LAW: A NEW SOURCE OF INSPIRATION?, *supra*, at 295, 297-98; Martin Gelter & Mathias M. Siems, *Language, Legal Origins, and Culture Before the Courts: Cross-Citations Between Supreme Courts in Europe*, 21 SUP. CT. ECON. REV. 215, 268 (2013) (concluding on the basis of statistical analysis of private law and criminal law decisions by ten European high courts that citation of foreign law “is not an isolated phenomenon in Europe but happens on a regular basis”); Johanna Kalb, *The Judicial Role in New Democracies: A Strategic Account of Comparative Citation*, 38 YALE J. INT’L L. 423, 424 & n.5, 425 (2013) (citing Uganda, India, South Africa, Japan, Namibia, France, Taiwan, and Hungary as examples of countries where courts frequently consider foreign and international law in the course of their deliberations); David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 523, 558-61 (2011) (documenting the Taiwanese Constitutional Court’s extensive behind-the-scenes usage of foreign law); Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 135 (2006) (observing that “[c]onsultation of foreign law seems to be the rule, not the exception” when national courts engage in constitutional interpretation); Cheryl Saunders, *Judicial Engagement with Comparative Law* (“The practice of referring to foreign constitutional experience is growing, in terms not only of the number of jurisdictions that engage in it but also of the range of comparators on which courts draw.”), in COMPARATIVE CONSTITUTIONAL LAW 571, 574, 586 (Tom Ginsburg & Rosalind Dixon eds., 2011); Li-ann Thio, *Beyond the “Four Walls” in an Age of Transnational Judicial Conversations: Civil Liberties, Rights Theories, and Constitutional Adjudication in Malaysia and Singapore*, 19 COLUM. J. ASIAN L. 428, 431-32, 497-518 (2006) (noting a “steady traffic of foreign cases in both Malaysian and Singaporean courts”); *Transcript of Interview of U.S. Supreme Court Associate Justice Ruth Bader Ginsburg, April 10, 2009*, 70 OHIO ST. L.J. 805, 820 (2009) [hereinafter *Justice Ginsburg Interview*] (expressing hope that the Court’s reluctance to “take account of international law and . . . refer to decisions of other tribunals” is a “passing phase,” and that the more accepting attitudes of the early nineteenth century toward judicial usage of foreign law will return); cf. Brian Flanagan & Sinéad Ahern, *Judicial Decision-Making and Transnational Law: A Survey of Common Law Supreme Court Judges*, 60 INT’L & COMP. L.Q. 1, 12-14 (2011) (noting a “paucity of judges who are on record as sceptics about the use of foreign law,” and reporting that, out of forty-three supreme court judges surveyed from common law jurisdictions, twenty-three responded that they “regularly” referred to foreign law in rights-related cases, while none claimed to avoid foreign law altogether).

¹² E.g., ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 65-103 (2004) (positing a “growing dialogue” among judges “around the world on the issues that arise before them”); Law & Chang, *supra* note 11, at 527, 535-68 (critiquing on both conceptual and empirical grounds the use of the “dialogue” metaphor to describe the judicial practice of citing foreign law).

¹³ See L’Heureux-Dubé, *supra* note 9, at 38-39 (observing that the Supreme Court’s failure to engage with relevant jurisprudence from other courts decreases the relevance and appeal of its own decisions to other courts); Michelman, *supra* note 10, at 241 (observing that the U.S. Supreme Court has “earn[ed] itself a mildly pariah status” by standing “noticeably aloof” from the practice among judiciaries in democratic countries of “treating each other’s judgments as required reading”).

itself.¹⁴ Although references to foreign law in a succession of high-profile constitutional decisions toward the tail end of the Rehnquist Court attracted tremendous attention,¹⁵ the actual number of constitutional cases in which the Court cites foreign law remains very low in absolute terms and may even be declining. From 1986 through 2010, less than 0.3% of opinions in constitutional cases—majority, concurring, and dissenting alike—cited foreign case law.¹⁶ Moreover, all of the citations that did occur date back to

¹⁴ See, e.g., Ruth Bader Ginsburg, "A Decent Respect to the Opinions of [Human] Kind": The Value of a Comparative Perspective in Constitutional Adjudication, 64 CAMBRIDGE L.J. 575, 584 (2005) (arguing that it is no more problematic for judges to consider foreign law than to consult treatises or legal scholarship, and listing various questions on which "comparative law inquiry could prove enlightening or valuable"); Justice Ginsburg Interview, *supra* note 11, at 820; Sandra Day O'Connor, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, 45 FED. LAW. 20, 20-21 (1998) ("[O]ther common law courts which have struggled with the same basic constitutional questions . . . have something to teach us Our flexibility, our ability to borrow ideas from other legal systems, is what will enable us to remain progressive, with systems that are able to cope with a rapidly shrinking world."); William Rehnquist, *Constitutional Courts - Comparative Remarks* ("[N]ow that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process. The United States courts, and legal scholarship in our own country generally, have been somewhat laggard in relying on comparative law and decisions of other countries."), in *GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993); Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, NEW YORKER, Sept. 12, 2005, at 42, 50 ("If we are asking the rest of the world to adopt our idea of freedom, it does seem to me that there may be some mutuality there, that other nations and other peoples can define and interpret freedom in a way that's at least instructive to us Liberty isn't for export only." (quoting Justice Kennedy)); Stephen Breyer & Antonin Scalia, Assoc. Justices, Supreme Court of the United States, A Conversation on the Relevance of Foreign Law for American Constitutional Adjudication, Discussion at the American University Washington College of Law (Jan. 13, 2005), available at <http://www.wcl.american.edu/secle/founders/2005/050113.cfm> (disclosing Justice Breyer's view that it is "important" for the Justices to show other courts that "we read their opinions"); Stephen Breyer, Assoc. Justice, Supreme Court of the United States, The Supreme Court and the New International Law, Address to the 97th Annual Meeting of the American Society of International Law (Apr. 4, 2003), available at http://www.supremecourt.gov/publicinfo/speeches/viewsspeech/sp_04-04-03 ("Ultimately, I believe the 'comparativist' view that several of us have enunciated will carry the day—simply because of the enormous value in any discipline of trying to learn from the similar experience of others.").

¹⁵ See David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 653-57 (2005) (noting the controversy over judicial citation of foreign law in constitutional cases decided mostly in the late 1990s and early 2000s, such as *Atkins v. Virginia*, 536 U.S. 304 (2002); *Lawrence v. Texas*, 539 U.S. 558 (2003); and *Printz v. United States*, 521 U.S. 898 (1997)); see also, e.g., Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 755 (2005) (arguing that the importance of the constitutional cases in which the Supreme Court cites foreign law has risen over time).

¹⁶ See Angioletta Sperti, *United States of America: First Cautious Attempts of Judicial Use of Foreign Precedents in the Supreme Court's Jurisprudence*, in THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES, *supra* note 11, at 393, 405. That figure includes citations to specific foreign

the Rehnquist Court; none occurred during the first six years of the Roberts Court.¹⁷ Nor is there reason to suspect that the U.S. Supreme Court routinely consults foreign law in the course of its deliberations without revealing that it has done so.¹⁸

Vast quantities of ink have been spilled over the normative question of whether, and in what ways, courts ought to engage with foreign law.¹⁹

decisions in concurring opinions but excludes references to international law and non-country-specific references to foreign practices, such as the “law of nations.” *Id.* at 395-98; *see also* Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT’L L. 409, 419-20 (2003) (finding “a remarkably low number” of U.S. Supreme Court cases over the preceding decade “in which there is even a passing reference to foreign law or legal practice”); David Zaring, *The Use of Foreign Decisions by Federal Courts: An Empirical Analysis*, 3 J. EMPIRICAL LEGAL STUD. 297, 299, 314 (2006) (noting that, in absolute terms, “the Supreme Court uses less foreign law now than it has at any other time in its history,” and that “the federal courts as a whole” are not “citing foreign tribunals any more frequently now than they were 60 years ago—once the increase in the total number of opinions is accounted for”).

¹⁷ *See* Sperti, *supra* note 16, at 405; *see also* Antonin Scalia, *Commentary*, 40 ST. LOUIS U. L.J. 1119, 1121 (1996) (“[I]n a very few instances in the less-distant past, the United States Supreme Court has looked to international ‘human rights’ norms in determining whether certain forms of punishment violated our Eighth Amendment But this approach, however, even within its limited scope of application, was short-lived and has now been retired.”).

¹⁸ Although many courts make a habit of researching and considering foreign law without divulging in their opinions that they do so, *see infra* Part I, those courts tend for a variety of reasons to be civil law courts. *See infra* notes 52-53 and accompanying text (discussing citation conventions among civil law courts). By contrast, the opinions rendered by common law courts tend to be relatively transparent about the sources taken into consideration. *See, e.g.*, Michel Bastarache, *How Internationalization of the Law Has Materialized in Canada*, 59 U. NEW BRUNSWICK L.J. 190, 200 (2009) (reporting that “attribution is systematic and considered mandatory” whenever the Canadian Supreme Court draws upon foreign jurisprudence); Law & Chang, *supra* note 11, at 533 & nn.33-35 (discussing, and rejecting, the possibility that the Canadian Supreme Court “looks habitually to the South African Constitutional Court for guidance and inspiration” but simply fails to acknowledge when it has done so); *infra* text accompanying notes 244-50 (discussing the Hong Kong Court of Final Appeal’s strong norm of fully disclosing all foreign authorities considered). *But see* Roger Alford, *Outsourcing Research About Outsourced Authority*, OPINIO JURIS (Nov. 22, 2006, 10:43 AM), <http://opiniojuris.org/2006/11/22/outsourcing-research-about-outsourced-authority>, archived at <http://perma.cc/VT2L-5WJG> (noting the number of research requests received by the Library of Congress from “judicial agencies” pertaining to foreign election law and constitutional court decisions, and concluding that “even in cases . . . that did not cite foreign authority[,] it appears the Court considered foreign experiences in rendering its decision, and relied on the Library of Congress to provide that information”).

¹⁹ *See, e.g.*, VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 17-102 (2010) (advocating a judicial posture of “engagement,” as opposed to “resistance” or “convergence,” toward foreign law); MARKESINIS & FEDTKE, *supra* note 11, at 109-65 (proposing various criteria for judicial use of foreign law); SLAUGHTER, *supra* note 12, at 65-103 (arguing that participation in a global “community of courts” and “common judicial enterprise” enables judges to “learn from one another’s experience and reasoning” and thus improve the quality of their decisionmaking); JEREMY WALDRON, “PARTLY LAWS COMMON TO ALL MANKIND”: FOREIGN LAW IN AMERICAN COURTS 3 (2012) (arguing that “sometimes it is appropriate for our courts to make use of foreign legal materials”); Roger P. Alford, *Four Mistakes in the Debate on*

Rarely, however, have scholars writing in this vein broached the empirical question of why some courts make greater use of foreign law than others.²⁰ The question is not as easily answered as it might appear. Two of the explanations that come most readily to mind—namely, isolationism on the part of judges, and political controversy over the use of foreign law—prove inadequate, especially when courts outside the United States are considered.

1. *The judicial isolationism hypothesis.* — It is tempting to think that judicial reluctance to use foreign law might simply reflect isolationism or parochialism on the part of judges, but there are several problems with this explanation. First, it is somewhat circular. To say that some judges refuse to engage with foreign law because they are isolationist is akin to saying that some people tend to vote Republican because they are Republicans. Labeling behavior is not the same as explaining behavior. Even if there are judges who can be described in some sense as isolationist, that merely begs the question of why they hold such views while others do not.

Second, the extent to which judges engage with the rest of the world does not appear to play a crucial role in determining whether they will practice comparativism. Foreign interaction is neither necessary nor sufficient for comparativism to occur. On the one hand, comparativism can be a routine occurrence even if foreign interaction is restricted, as shown by the example of the Taiwanese Constitutional Court.²¹ On the other hand,

"*Outsourcing Authority*," 69 ALB. L. REV. 653, 658-61 (2006) (listing various "heavy-weights" on both "the left and right" who have offered arguments for and against judicial citation of foreign law, and observing that the debate has "spilled over into contemporary political parlors"); Michael Kirby, *Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges*, 9 MELB. J. INT'L L. 171, 184 (2008) (arguing that "[i]nternational engagement" can help judges to "enhance their service to their own courts, enlarge their thinking and improve the efficiency of their judicial service"); Law, *supra* note 15, at 653-59 (providing an overview of the heated normative debate over the propriety of the Supreme Court's use of comparative analysis in constitutional cases); Law & Versteeg, *supra* note 6, at 1166 (noting the "extensive, if not tiresome, normative debate" over judicial citation of foreign and international law, and citing numerous examples); L'Heureux-Dubé, *supra* note 9, at 40 (exhorting the U.S. Supreme Court to join in the "global dialogue on human rights and other common legal questions" by considering the decisions of courts elsewhere); see also Antonin Scalia, *Outsourcing American Law: Foreign Law in Constitutional Interpretation* 5 (Am. Enter. Inst., Working Paper No. 152, 2009), available at <http://www.aei.org/wp-content/uploads/2011/10/20090820-Chapter2.pdf> (lamenting that the citation of foreign law in constitutional cases appears to be the "wave of the future").

²⁰ See HIRSCHL, *supra* note 11, at 40 (observing that, "despite the tremendous scholarly interest in the international migration of constitutional ideas, the actual empirical evidence on the nature and scope of reference to foreign law . . . remains thin"); Ryan C. Black & Lee Epstein, (*Re-*)*Setting the Scholarly Agenda on Transjudicial Communication*, 32 LAW & SOC. INQUIRY 791, 792 (2007) (urging "empirically minded" scholars to remedy the lack of "rigorous theoretical and empirical research devoted to understanding the exchange of law among nations").

²¹ See *infra* Sections IV.B & IV.E (juxtaposing the Taiwanese Constitutional Court's habitual usage of foreign law with its heavily restricted opportunities for engagement with foreign courts).

frequent interaction with foreign courts and foreign judges does not guarantee a thriving practice of comparativism. For evidence of this fact, we need look no further than the U.S. Supreme Court, which is well connected to foreign courts but nevertheless shuns comparativism. Across the ideological spectrum, the Justices are in high demand internationally as both guests and hosts, and they do not turn their backs on the rest of the world. Indeed, the Court hosts overseas visitors so often that it has developed the equivalent of a diplomatic office for dealing with them.²²

Nor is it only the advocates of comparativism who enjoy foreign contact.²³ Even Justices known for their opposition to comparative constitutional analysis²⁴ frequently visit foreign courts and participate in international conferences.²⁵ As unlikely as it might be for Justice Scalia to cite Taiwanese

²² See SLAUGHTER, *supra* note 12, at 98-99 (describing “the formation of an actual ‘foreign policy’ arm of the U.S. federal judiciary” in the form of the Committee on International Judicial Relations); *International Judicial Relations*, FED. JUD. CENTER, http://www.fjc.gov/ijr/home.nsf/page/intl_activities (last visited Feb. 28, 2015), *archived at* <http://perma.cc/9N7V-8U3F> (describing the Federal Judicial Center’s international activities and its Office of International Judicial Relations).

²³ See sources cited *supra* note 14 (quoting Justices Breyer, Ginsburg, and O’Connor, and the late Chief Justice Rehnquist). In the specific context of treaty interpretation, even Justice Scalia has advocated a comparativist approach. See Alford, *supra* note 19, at 657 & n.23 (citing *Olympic Airways v. Husain*, 540 U.S. 644, 660-61 (2004) (Scalia, J., dissenting)).

²⁴ See Law, *supra* note 15, at 655-56 (quoting various opinions by Justices Scalia and Thomas critical of foreign law usage); Tim Wu, *Foreign Exchange: Should the Supreme Court Care What Other Countries Think?*, SLATE (Apr. 9, 2004, 5:03 PM), http://slate.com/articles/news_and_politics/jurisprudence/2004/04/foreign_exchange.html, *archived at* <http://perma.cc/FAD8-XSYR> (likening the exchanges within the Court over the use of foreign legal materials to “a Punch and Judy show,” in which “[j]ust about every time the court cites foreign materials, Scalia and/or Clarence Thomas dissent”). *But cf.* MARKESINIS & FEDTKE, *supra* note 11, at 60-61 (quoting Justice Scalia’s discussion of Australian, Canadian, and English election law in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 381-82 (1995), and querying “how . . . a judge who denounces so strongly references to foreign law when opposing moves to decriminalise sodomy or restrict the application of the death penalty [can] nonetheless invoke foreign examples himself”); Ryan C. Black et al., *Upending Global Debate: An Empirical Analysis of the U.S. Supreme Court’s Use of Transnational Law to Interpret Domestic Doctrine*, 103 GEO. L.J. 1, 32 tbl.4 (2014) (finding empirically that, through 2008, Justice Scalia referred to foreign countries and foreign tribunals more often than Justice Breyer); Anne-Marie Slaughter, *A Brave New Judicial World* (noting Justice Scalia’s insistence that American judges “look to the national decisions of other treaty parties” when interpreting international treaties, and citing Justice Scalia’s dissent in *Olympic Airways v. Husain*, 540 U.S. 644 (2004), as an example), in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS*, *supra* note 5, at 277, 283.

²⁵ See Scalia, *supra* note 17, at 1122 (“I welcome international conferences . . . in which the judges of various countries may exchange useful insights and information . . .”); Jada F. Smith, *Royalties and Teaching Help Fill Bank Accounts of Justices, Report Says*, N.Y. TIMES, June 21, 2014, at A16 (noting that, while Justice Breyer “traveled to the most foreign countries,” Justice Scalia “took more trips than any of his colleagues in 2013, filing for reimbursement on 28 excursions, including one to Peru, one to Germany and two trips to Italy”); Bill Mears, *Justices’ Finances Show Overseas Travel, Book Royalties, Gifts*, CNN.COM (June 20, 2012, 5:51 PM), <http://www.cnn.com/2012/06/20/us/scotus-justices-finances>, *archived at* <http://perma.cc/LQ7A-SGPT> (describing all of the

constitutional precedent, for example, he is one of the few jurists from anywhere in the world to have visited the Taiwanese Constitutional Court in person.²⁶ Indeed, the globetrotting Justice Scalia—who once taught comparative law²⁷—is second only to Justice Breyer in the extent of his foreign travel.²⁸ In short, whatever reasons certain members of the Court may have for denouncing the use of foreign law in constitutional cases,²⁹ those reasons do not stem from a lack of foreign contact or rank xenophobia.

2. *The political controversy hypothesis.* — Alternatively, it might be argued that the degree of judicial comparativism depends on the degree of political controversy surrounding it. Perhaps the strongest evidence in favor of this hypothesis comes from the United States, where judicial aversion to foreign law coincides with unusually intense opposition to comparativism.³⁰ Justices who dare to cite foreign law have faced calls for impeachment and even death threats,³¹ while nominees to the Court now take care to disavow the use of foreign law in constitutional interpretation.³² Meanwhile, a nationwide

justices as “busy travelers,” revealing that Justice Scalia is “neck-and-neck” with Justice Breyer in the extent of his overseas travel, and noting Justice Thomas’s participation together with Justice Kagan at an international legal conference in Argentina).

²⁶ See Law & Chang, *supra* note 11, at 555.

²⁷ See *Nomination of Judge Antonin Scalia, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 3 (1986) (statement of Sen. John Warner) (summarizing then-Judge Scalia’s teaching experience at the University of Virginia).

²⁸ See Smith, *supra* note 25; Mears, *supra* note 25 (describing Justice Scalia as “neck-and-neck” with Justice Breyer in the extent of his overseas travel, as revealed by their financial disclosure forms).

²⁹ See Law, *supra* note 15, at 655–56 (quoting various criticisms leveled by Justice Scalia against other members of the Court for citing foreign law).

³⁰ Compare, e.g., KEN I. KERSCH, *CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW* 103–11 (2004) (describing how “judicial flirtation with treaties and international human rights agreements” in the years immediately following World War II “occasioned a swift and serious political response,” including calls for a constitutional amendment to limit the Treaty Power), MARKESINIS & FEDTKE, *supra* note 11, at 55 (describing the tone of the American debate over judicial comparativism as “surprisingly strident”), and Alford, *supra* note 19, at 664 (noting a “groundswell of opposition” in the United States to constitutional comparativism “from various corners and for a variety of reasons”), with, e.g., HIRSCHL, *supra* note 11, at 30, 141 (noting that the practice of citing foreign law “has never been seriously contested” in Canada).

³¹ See, e.g., Ginsburg, *supra* note 14, at 581–82 (noting various congressional bills and resolutions against the use of foreign law by the federal courts, and quoting the death threat made against Justices O’Connor and Ginsburg for their support of comparativism); Law, *supra* note 15, at 657 n.17 (citing examples of negative political and popular reaction to citation of foreign law by members of the Court).

³² See, e.g., Alford, *supra* note 19, at 680 (“[A] judge’s willingness to rely on comparative experiences in constitutional interpretation quickly has become an important test for many senators in judging a judicial nominee’s qualifications.”); Ronald J. Krotoszynski, Jr., *The Heisenberg Uncertainty Principle and the Challenge of Resisting—or Engaging—Transnational Constitutional Law*, 66 ALA. L. REV. 105, 110 n.24 (2014) (citing the confirmation hearings of Chief Justice Roberts and Justices Alito, Sotomayor, and Kagan); David M. Herszenhorn, *Court Nominee Criticized As*

campaign to enact laws limiting or prohibiting judicial usage of foreign law continues to gain traction. As of this writing, legislatures in thirty-four states³³ as well as Congress³⁴ have considered taking measures against judicial comparativism; in eleven states, some type of action has passed the legislature.³⁵ Not surprisingly, experimental evidence suggests that citation

Relying on Foreign Law, N.Y. TIMES, June 26, 2009, at A13 (reporting on congressional criticism of public remarks by then-Judge Sotomayor that were supportive of comparativism).

³³ Support for the campaign appears to draw upon a combination of opposition to judicial usage of foreign law in general and animus directed at Islamic law in particular. See FAIZA PATEL ET AL., CTR. FOR AM. PROGRESS & BRENNAN CTR. FOR JUSTICE, FOREIGN LAW BANS: LEGAL UNCERTAINTIES AND PRACTICAL PROBLEMS 1-13 (2013), available at <https://www.brennancenter.org/sites/default/files/publications/ForeignLawBans.pdf>; Kimberly Railey, *More States Move to Ban Foreign Law*, USA TODAY, Aug. 5, 2013, at 4A. The thirty-four states where laws against judicial use of foreign law have been introduced or enacted as of this writing are Alabama, where voters have passed a constitutional amendment placed on the ballot by the legislature, S.B. 4, 2013 Leg., Reg. Sess. (Ala. 2013); Alaska, H.B. 88, 27th Leg., 2d Sess. (Alaska 2011) (lapsed due to committee inaction); Arizona, where legislation was enacted in 2011, ARIZ. REV. STAT. § 12-3103 (2011); Arkansas, H.B. 1348, 89th Gen. Assemb., Reg. Sess. (Ark. 2013) (lapsed due to committee inaction); Florida, FLA. STAT. § 61.0401 (2014); Georgia, S. Res. 808, 152d Gen. Assemb., 2d Reg. Sess. (Ga. 2014) (committee proceedings pending); Idaho, which passed a nonbinding resolution, H. Con. Res. 44, 60th Leg., 2d Reg. Sess. (Idaho 2010); Indiana, S.B. 460, 118th Gen. Assemb., Reg. Sess. (Ind. 2013); Iowa, H.F. 76, 85th Gen. Assemb., Reg. Sess. (Iowa 2013); Kansas, where legislation was enacted in 2012, KAN. STAT. ANN. § 60-5103 (2012); Kentucky, H.B. 43, 2014 Leg., Reg. Sess. (Ky. 2014); Louisiana, where legislation was enacted in 2010, LA. REV. STAT. ANN. § 9:6001 (2010); Maine, H.P. 811, 125th Leg., 1st Reg. Sess. (Me. 2011); Michigan, H.B. 4769, 96th Leg., Reg. Sess. (Mich. 2011); Minnesota, where the bill in question was withdrawn by its author, S.F. 2281, 87th Leg., Reg. Sess. (Minn. 2012); Mississippi, H.B. 44, 129th Leg., Reg. Sess. (Miss. 2014); Missouri, where a bill passed by the legislature was vetoed by the governor, S.B. 267, 97th Gen. Assemb., 1st Reg. Sess. (Mo. 2013); H.B. 757, 97th Gen. Assemb., 1st Reg. Sess. (Mo. 2013); Nebraska, Leg. B. 647, 102d Leg., 1st Reg. Sess. (Neb. 2011); New Hampshire, H.B. 1422, 2011 Gen. Court, 162d Sess. (N.H. 2011); New Jersey, where the bill in question was withdrawn, Assemb. B. 3496, 214th Leg., Reg. Sess. (N.J. 2010); New Mexico, S.J. Res. 14, 50th Leg., 2d Reg. Sess. (N.M. 2012) (lapsed due to committee inaction); North Carolina, 2013 N.C. Sess. Laws 416; Oklahoma, which enacted a ban in 2013, OKLA. STAT. tit. 12, § 20 (2013); Pennsylvania, H.B. 2029, 195th Gen. Assemb., Reg. Sess. (Pa. 2011); South Carolina, S. 60, 120th Gen. Assemb., 1st Reg. Sess. (S.C. 2013); S. 81, 120th Gen. Assemb., 1st Reg. Sess. (S.C. 2013); South Dakota, which passed a law in 2012, S.D. CODIFIED LAWS § 19-8-7 (2012); Tennessee, which passed legislation in 2010, TENN. CODE ANN. § 20-15-102 (2010); Texas, H.B. 288, 83d Leg., Reg. Sess. (Tex. 2012); S. 1639, 83d Leg., Reg. Sess. (Tex. 2013); Utah, H.B. 296, 58th Leg., Gen. Sess. (Utah 2010); Vermont, S. 265, 2014 Leg., Reg. Sess. (Vt. 2014); Virginia, H.B. 1322, 2013 Gen. Assemb., Reg. Sess. (Va. 2013); Washington, which enacted a law in 2013, WASH. REV. CODE § 2.28.165(4)-(6) (2013); West Virginia, H.R. 2216, 2013 Leg., Reg. Sess. (W. Va. 2014); and Wyoming, H.J. Res. 0005, 62d Leg., Reg. Sess. (Wyo. 2013); H.J. Res. 0004, 62d Leg., Reg. Sess. (Wyo. 2013).

³⁴ See Law, *supra* note 15, at 656 n.16 (citing various bills and resolutions introduced in Congress).

³⁵ The states in question are Alabama (where legislative action has placed a constitutional amendment on the ballot), Arizona, Florida, Idaho (where the legislature passed a nonbinding resolution), Missouri (where the law was vetoed by the governor), Kansas, Louisiana, North Carolina, Oklahoma, South Dakota, and Tennessee. See *supra* note 33 (citing the relevant bills and resolutions).

of foreign law may undermine rather than bolster public acceptance of Supreme Court opinions.³⁶

It is not difficult to imagine that such pressure might have an effect on the Justices. Time and time again, the Supreme Court has demonstrated its sensitivity both to public opinion³⁷ and to the elected branches.³⁸ In reality, however, the Justices do not behave as if they are simply slaves to public opinion, as evidenced by the fact that a number of them have made a point of publicly advocating comparativism.³⁹ If their goal is truly to avoid controversy or criticism, the last thing they should do is take a public stand in favor of something very controversial. Yet this is precisely what some of them do, and the political controversy hypothesis cannot easily account for their behavior.

The behavior of courts in other countries is even harder for the political controversy hypothesis to explain. In East Asia, popular and political attitudes toward comparativism do not vary much from country to country, yet there are significant variations in the level of foreign law usage. Japan, Korea, Taiwan, and Hong Kong share similarly welcoming attitudes toward foreign law, yet the Japanese Supreme Court makes much less use of foreign law than the Korean or Taiwanese Constitutional Court or the

³⁶ See Brett Curry & Banks Miller, *Looking for Law in All the Wrong Places? Foreign Law and Support for the U.S. Supreme Court*, 36 POL. & POL'Y 1094, 1107-08 (2008) (reporting the results of an experiment conducted upon undergraduate students in which citation of foreign law in fabricated Supreme Court decisions decreased support for the Court among subjects with low levels of political knowledge).

³⁷ The Supreme Court's responsiveness to public opinion has been repeatedly documented by political scientists, see, e.g., KERSCH, *supra* note 30, at 110 (noting that "virulent political reaction" and "critical commentary" against judicial use of treaties to advance human rights led courts to abandon "bold reasoning" that deemed treaties such as the U.N. Charter to be self-executing); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957) (finding that "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States"); Terri Peretti, *An Empirical Analysis of Alexander Bickel's The Least Dangerous Branch* (surveying the literature, and noting findings to the effect that the Court may follow public opinion more closely than Congress), in THE JUDICIARY AND AMERICAN DEMOCRACY: ALEXANDER BICKEL, THE COUNTERMAJORITARIAN DIFFICULTY, AND CONTEMPORARY CONSTITUTIONAL THEORY 123, 130-33 (Kenneth D. Ward & Cecilia R. Castillo eds., 2005), and more recently by legal scholars as well, see BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION *passim* (2009).

³⁸ See ANNA HARVEY, A MERE MACHINE: THE SUPREME COURT, CONGRESS, AND AMERICAN DEMOCRACY *passim* (2013) (showing empirically the extent to which the Court defers to congressional preferences, particularly those of the House of Representatives).

³⁹ See *supra* note 14 (quoting Justices Breyer, Ginsburg, and O'Connor and the late Chief Justice Rehnquist).

Hong Kong Court of Final Appeal.⁴⁰ Because the level of comparativism varies even when the degree of controversy surrounding it does not, the degree of controversy obviously cannot explain the variation in the level of comparativism.

This is not to suggest that political controversy has no effect on the practice of judicial comparativism. But it is never the only factor at play, and in many countries, it is not even an important factor. The role of institutional factors, by contrast, is widely overlooked and underestimated. Legal scholars and political scientists alike tend to depict judicial behavior as a function of the legal views and policy preferences that judges hold, subject to constraints imposed by the political environment.⁴¹ Yet the structure and practices of institutions such as courts and law schools also have profound effects on the preferences and capabilities of judges and lawyers.⁴² Judicial and popular attitudes may help to explain whether judges want to engage in comparativism, but they cannot explain how those attitudes arose in the first place. Nor do those attitudes determine whether judges are even capable of practicing comparativism. For answers to such questions, we must also consider the implications of the institutional environment for judicial behavior.

⁴⁰ See *infra* Sections II.B, III.B, IV.B, V.B (discussing attitudes toward comparativism and levels of comparativism in Japan, Korea, Taiwan, and Hong Kong).

⁴¹ See, e.g., RICHARD H. FALLON JR., *THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW AND PRACTICE*, at xii (2d ed. 2013) (“To generalize grossly, law professors have tended to view the Justices as driven by felt obligations of fidelity to distinctively legal ideals, while political scientists have regarded them as ideologically motivated actors with political agendas.”); *id.* at xvii (acknowledging “the now familiar insight that loosely ‘political’ values and concerns influence Supreme Court decision making”); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 48-114 (2002) (contrasting the “legal model” of Supreme Court decisionmaking, which holds that judicial decisions are “substantially influenced” by a combination of case-specific facts and governing law, with the “attitudinal model,” which holds that “the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices,” and the “rational choice model,” which holds that the justices pursue a broad range of goals in strategic ways); Keith E. Whittington, *Once More Unto the Breach: PostBehavioralist Approaches to Judicial Politics*, 25 *LAW & SOC. INQUIRY* 601, 629 (2000) (noting that emphasis on the “sharp dichotomy” between legal and political explanations for judicial behavior has been “most pronounced when scholars of the Court are engaged in competition over models of judicial behavior”).

⁴² See, e.g., James G. March & Johan P. Olsen, *The New Institutionalism: Organizational Factors in Political Life*, 78 *AM. POL. SCI. REV.* 734, 789 (1984) (contrasting mainstream political science, which treats preferences as exogenous, with “new institutionalism,” which argues that preferences develop “through a combination of education, indoctrination, and experience” and emphasizes the role of institutions in inculcating preferences); Whittington, *supra* note 41, at 615 (“Individuals cannot be conceptualized as autonomous, free choosers who just happen to find themselves in a particular institutional context. Institutions do not merely impose constraints on choices; they constitute preferences.”).

This Article argues that a combination of symbiotic institutional factors must exist in order for judicial comparativism to thrive. The first factor is institutional capacity: a court that lacks the institutional capacity to learn about foreign law is, in a literal sense, incapable of engaging in comparativism in more than ad hoc fashion. Institutional capacity may not be a sufficient condition for comparativism to occur, but it is a necessary condition. The second factor, without which the first cannot exist, is a system of legal education that values and inculcates the practice of comparativism. High levels of judicial engagement with foreign law are dependent upon the availability of institutional mechanisms for learning about foreign law, such as the availability of clerks or researchers with foreign legal expertise. Such mechanisms are unlikely to be effective, in turn, unless they are backed by a system of legal education that produces an adequate supply of lawyers with both the ability and the desire to engage in comparativism.

The effects of institutional variation can be observed only by studying institutions that actually vary from one another. In other words, the study of judicial comparativism requires a comparative approach. The heart of this Article, therefore, is an in-depth look at the operation of the most prominent constitutional courts in East Asia, an increasingly important region of the world that nevertheless receives relatively little scholarly attention.⁴³

⁴³ See, e.g., HIRSCHL, *supra* note 11, at 4, 17, 163, 211-13 (noting the “near-exclusive focus” of the field of comparative constitutional law on “a small number of overanalyzed, ‘usual suspect’ constitutional settings or court rulings” drawn from “a dozen liberal democracies,” and the resultant fact that the “constitutional experiences of entire regions,” including much of Asia, “remain largely uncharted terrain, understudied and generally overlooked”); MARK TUSHNET, *ADVANCED INTRODUCTION TO COMPARATIVE CONSTITUTIONAL LAW* 5 (2014) (suggesting that “South and East Asia are relatively neglected areas of study” “[p]artly because of language issues”); Sujit Choudhry, *Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies* (observing that “[f]or nearly two decades,” the comparative constitutional law literature has been “oriented around a standard and relatively limited set of cases: South Africa, Israel, Germany, Canada, the United Kingdom, New Zealand, the United States, and to a lesser extent, India”), in *CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION?* 3, 8 (Sujit Choudhry ed., 2008); Rosalind Dixon & Tom Ginsburg, *Introduction* to *RESEARCH HANDBOOK ON COMPARATIVE CONSTITUTIONAL LAW* 1, 13 (Tom Ginsburg & Rosalind Dixon eds., 2011) (“It is probably the case that 90% of comparative work in the English language covers the same ten countries, for which materials are easily accessible in English.”); *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 *INT’L. J. CONST. L.* 519, 530 (2005) [hereinafter *Scalia-Breyer Conversation*] (“We have referred to opinions of India’s Supreme Court. But I confess that fewer opinions from other Asian nations come to our attention.” (quoting Justice Breyer)); see also, e.g., Andrew Harding & Peter Leyland, *Preface* to *CONSTITUTIONAL COURTS: A COMPARATIVE STUDY*, at v-vi (Andrew Harding & Peter Leyland eds., 2009) (introducing a collection consisting of eight chapters on European courts, three on African courts (including one on South Africa), two on Asian courts, and one survey chapter on Latin American courts, and acknowledging explicitly that the selection of courts was

The specific courts in question are the Japanese Supreme Court (JSC), the Korean Constitutional Court (KCC), the Taiwanese Constitutional Court (TCC), and the Hong Kong Court of Final Appeal (HKCFA). Although Asian courts do not have a reputation for engaging in comparativism,⁴⁴ the reality is that all four of these courts make substantially greater use of foreign law than the U.S. Supreme Court.

Investigation of these courts sheds light on not only the institutional mechanisms, but also the hidden motivations behind judicial comparativism. Interviews with numerous judges and other officials disclose that courts practice comparativism not only to enrich or justify their decisions, but also to pursue what might best be described as *judicial diplomacy*.⁴⁵ Courts engage in a variety of activities, ranging from translation of their own opinions and citation of foreign law to engagement with international organizations, that are not aimed simply at crafting stronger opinions or winning over domestic audiences. These activities also constitute strategies for competing or cooperating with other courts in pursuit of political, economic, and diplomatic

constrained by “the availability of scholars with the appropriate interest and expertise”); JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD (Peter H. Russell & David M. O’Brien eds., 2001) (containing six chapters on European jurisdictions, five chapters on former British territories, and only two chapters on other jurisdictions—namely, one on Japan and one on Central America); MARKESINIS & FEDTKE, *supra* note 11, at 62–108 (analyzing the use of comparative law in Italy, France, England, Germany, Canada, and South Africa).

⁴⁴ See Wen-Chen Chang & Jiunn-Rong Yeh, *Internationalization of Constitutional Law* (reporting that there is “little judicial dialogue” in Asia, and that Asian courts tend either to refrain from engaging in “explicit comparative analysis” or to focus on a narrow set of “common law jurisdictions,” depending upon whether they hail from a civil law or common law tradition), in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1165, 1173, 1176 (Michel Rosenfeld & András Sajó eds., 2012); Tom Ginsburg, *Eastphalia as the Perfection of Westphalia*, 17 IND. J. GLOBAL LEGAL STUD. 27, 33 (2010) (noting the grudging approach of Japanese courts to the domestic application of international law, and describing the resistance offered in the name of “Asian values” to the “liberal universalism” of rights discourse).

⁴⁵ See Alford, *supra* note 19, at 669–70 (observing that, for the first time ever, “we have Supreme Court Justices who are . . . actively embracing global constitutionalism in an effort to perform functions akin to foreign diplomats,” and citing Justices Breyer and Kennedy as examples); Ken I. Kersch, *The Supreme Court and International Relations Theory*, 69 ALB. L. REV. 771, 774–75, 787 (2006) (observing that “the justices may frequently understand themselves as diplomats, representing American values and explaining American practices to what is often an ignorant, misinformed, or hostile world,” and that the tendency of legal scholars to treat the “‘globalist’ turn” in deciding domestic constitutional cases “as an issue of interpretive theory” has obscured the extent to which the Justices have employed “a whole range of ‘diplomatic’ justifications” for their behavior); Law & Chang, *supra* note 11, at 570 (likening the TCC’s extensive use of foreign jurisprudence to “a form of judicial diplomacy” that can counteract Taiwan’s severe diplomatic isolation by “generat[ing] badly needed support and acceptance among the international community”); Law & Versteeg, *supra* note 6, at 1181 (arguing that the adoption of constitutional ideas from other countries can be an attractive strategy for “marginal states” to “court[] foreign approval and enhance[] their legitimacy”).

objectives. Comparativism is part of a repertoire of judicial strategies for achieving goals of an international character.

Part I explains the methodology behind this Article and the measurement challenges that it is designed to address. On the one hand, a full account of how and why courts engage in comparativism cannot be gathered simply by reading judicial decisions. Quantitative data collection that relies on the coding of judicial opinions is particularly inadequate because many courts do not disclose in their opinions the extent of their foreign legal research. On the other hand, a qualitative case study approach runs into the problem that it can be difficult to generalize from a small number of cases. This Article responds to these challenges by combining extensive interview-based research with a case selection strategy designed to isolate the effect of particular variables.

Parts II, III, IV, and V offer detailed accounts of the comparativist practices and foreign dealings of the JSC, KCC, TCC, and HKCFA respectively. Each case study highlights a number of variables that cannot be captured by reading the court's decisions, such as the gap between foreign law usage and foreign law citation and the institutional mechanisms for conducting foreign legal research. The relevant institutional characteristics of the four courts, as well as the U.S. Supreme Court, are summarized in Table 1. Across the board, each court's institutional capacity for comparativism is highly correlated with the degree to which it actually uses foreign law. The KCC, TCC, and HKCFA are better equipped to perform foreign legal research than the JSC, which in turn enjoys decisive advantages over the U.S. Supreme Court. It is no coincidence that the JSC's level of foreign law usage falls between that of the KCC, TCC, and HKCFA, at the high end of the spectrum, and the U.S. Supreme Court, at the low end.

Part VI canvasses a variety of legal and political explanations for comparativism, such as a shortage of domestic jurisprudence or a court's need for credibility in the eyes of domestic audiences. Although there is truth to many of these explanations, they do not tell the whole story. Drawing upon the wealth of information provided by the case studies, Part VII highlights the fact that courts sometimes engage in comparativism for reasons that have less to do with adjudication than diplomacy. Among East Asian courts, comparativism serves goals that range from cultivating international influence and prestige, to promoting the rule of law in other countries, to reassuring foreign investors, to fulfilling treaty-based sovereignty arrangements. Comparativism is not always, however, the preferred judicial strategy for advancing such goals. Although the U.S. Supreme Court rarely

practices constitutional comparativism, it is an active practitioner of judicial diplomacy in other forms.

Part VIII makes the basic but widely overlooked point that comparativism is shaped as much by the ability of judges to use foreign law as by their desire to do so. Courts and judges operate within institutional and resource constraints that define the outer limits of their capabilities. These constraints include the range of institutional mechanisms within a court for learning about foreign law, and the extent to which legal education generates an adequate supply of lawyers and judges with both the ability and the desire to consult foreign law.

The Conclusion reflects on both the inevitability of judicial diplomacy and the obstacles that courts face in their pursuit of international influence and prestige. Notwithstanding the globalization of constitutional law, it remains difficult for constitutional courts to be fully global in either influence or intellectual reach. Instead, courts belong to jurisprudential networks or legal families, and they tend to exhibit little interest in, or influence over, courts that fall outside their own groups.

I. THE CHALLENGES OF MEASURING COMPARATIVISM: METHODOLOGY AND DATA COLLECTION

Comparativism can be defined and measured in more ways than one. In order to understand what we are attempting to explain and how it can be measured, we must draw two distinctions. The first is the distinction between *foreign* law and *international* law. Although scholars sometimes lump foreign law together with international law under the umbrella category of “transnational law,”⁴⁶ foreign law usage and international law usage do not occur for exactly the same reasons. In particular, judicial usage of international law often enjoys a stronger legal basis than judicial usage of foreign law.⁴⁷ Therefore, the two phenomena cannot be treated as fungible

⁴⁶ E.g., Black et al., *supra* note 24, *passim* (exploring the conditions under which the Justices cite “transnational law,” without distinguishing between foreign law and international law).

⁴⁷ The most obvious difference is that countries often consider themselves bound by international law, whereas they are by definition not bound by foreign law. See HIRSCHL, *supra* note 11, at 75 (noting that, “[u]nlike the legally binding and warranted application of other bodies of law,” the practice of referring to “foreign law” is “purely voluntary”); JACKSON, *supra* note 19, at 169 (noting that “much international law is binding, or potentially binding, on all nations” whereas “comparative foreign law is not”); David S. Law, *Constitutional Convergence and Comparative Competency: A Reply to Professors Jackson and Krotoszynski*, 66 ALA. L. REV. 145, 146-47 (2014) (noting that it is normatively plausible for courts to pursue convergence with international law, but not convergence with foreign law). It is also the case that constitutions often contain provisions expressly authorizing or even obligating courts to take heed of international law. See Tom Ginsburg et al., *Commitment and Diffusion: How and Why National Constitutions Incorporate*

for purposes of explanation. This Article concerns itself with judicial usage of foreign law as opposed to international law.

The second crucial distinction is between judicial *citation* of foreign law and judicial *usage* of foreign law. Citation of foreign law is a narrow phenomenon that can be measured simply by reading judicial opinions. Usage of foreign law is a broader phenomenon that can be much harder to observe. Perhaps because citation is so easily observed and quantified, it is tempting to conflate citation and usage, or to treat citation as a convenient proxy for usage.⁴⁸ However, the two are not the same, and neither is a satisfactory proxy for the other, for several reasons.

First, courts frequently fail to cite their sources. Numerous courts make a habit of researching and weighing foreign law yet rarely, if ever, divulge their research by citing it explicitly in their published opinions.⁴⁹ The copious citation practices followed by courts in common law jurisdictions such as Canada, South Africa, and the United States may reliably indicate

International Law, 2008 U. ILL. L. REV. 201, 207-10 (listing the number and percentage of constitutions written after 1945 that explicitly reference or incorporate treaties or customary international law). By contrast, constitutions are much less likely to explicitly endorse judicial usage of foreign law. Apart from the constitutions of South Africa or Zimbabwe, it is unclear whether any national constitutions do so, and even the South African constitution gives foreign law less favorable treatment than international law. *See* S. AFR. CONST., 1996, ch. 2, § 39 (“When interpreting the Bill of Rights, a court . . . (b) must consider international law; and (c) may consider foreign law.”); ZIM. CONST., 2013, § 46 (“When interpreting this Chapter, a court . . . may consider relevant foreign law . . .”).

⁴⁸ *See, e.g.*, Black et al., *supra* note 24 (referring interchangeably to the “using” and “citing” of transnational law).

⁴⁹ *See, e.g.*, BOBEK, *supra* note 11, at 97, 174 (noting that judges in France and Slovakia frequently consider foreign law but consider it improper to cite foreign law in their decisions); MARKESINIS & FEDTKE, *supra* note 11, at 62-65 (discussing France and Italy, and noting that, although French judicial opinions as a rule do not cite foreign law, the *avocats généraux* who advise the *Cour de cassation* “are nowadays expected to consult foreign law when preparing their recommendations”); LÁSZLÓ SÓLYOM & GEORG BRUNNER, CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT 4-5 (2000) (revealing that the Hungarian Constitutional Court is influenced by the jurisprudence of several countries, especially Germany, but explicitly cites only the European Court of Human Rights); Gelter & Siems, *supra* note 11, at 234, 240 (noting that variations in “citation style” may explain why the supreme courts of France, Italy, and Spain cite foreign decisions less frequently than other supreme courts in Europe, and that study of citations alone “cannot capture when judges do not disclose the origin of their inspiration coming from foreign cases or contacts with their peers abroad,” or when courts issue documents other than decisions that reflect their knowledge of foreign law); Gábor Halmai, *The Use of Foreign Law in Constitutional Interpretation* (dividing “constitutional jurisdictions” into three categories: those which do not use foreign law, such as the U.S. Supreme Court; “those which do use foreign law but do not do so explicitly,” such as Hungary; and “those which do so explicitly,” such as South Africa), in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 44, at 1328, 1329; Law & Chang, *supra* note 11, at 557 (discussing the Taiwanese Constitutional Court’s decision not to cite foreign law).

the use of foreign law,⁵⁰ but such practices are far from universal.⁵¹ The opinion-writing conventions of civil law courts, for example, may disfavor the explicit citation of any case law, much less foreign case law.⁵² As a

⁵⁰ See, e.g., Bastarache, *supra* note 18, at 200 (reporting that “attribution is systematic and considered mandatory” whenever the Canadian Supreme Court draws upon foreign jurisprudence); Law & Chang, *supra* note 11, at 523, 533 & nn.33-35 (discussing, and rejecting, the possibility that the Canadian Supreme Court “looks habitually to the South African Constitutional Court for guidance and inspiration” but simply fails to acknowledge when it has done so); *infra* text accompanying notes 244-50 (noting that the Hong Kong Court of Final Appeal makes a point of disclosing any foreign authorities on which it has relied).

⁵¹ See, e.g., BOBEK, *supra* note 11, at 84 (describing the style of English judicial decisions as “open and discursive” and “not hiding anything,” “[i]n contrast to the judicial reasoning styles in a number of Continental jurisdictions”); MITCHEL DE S.-O.-L’E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 3-5 (2004) (summarizing the manner in which common law observers tend to contrast the opinion-writing practices of common law and civil law courts); MARKESINIS & FEDTKE, *supra* note 11, at 62-66 (citing Italy and France as examples of countries where courts give considerable attention to, but do not cite, foreign law); Bryde, *supra* note 11, at 297 (noting that “the German Constitutional Court has developed a style of reasoning where it basically cites only its own precedents”); Saunders, *supra* note 11, at 580 (observing that “features of the process of adjudication . . . associated with common law and civil law legal systems” may help to “explain differences in the extent of explicit reference to foreign constitutional experience in judicial reasoning”).

⁵² Citation practices vary within the civil law world, but French and German constitutional adjudication share in common their tendency to cite only a narrow range of domestic legal sources. The French judicial style is famously restrictive and frowns upon citation of anything but codified domestic law. See JOHN BELL, JUDICIARIES WITHIN EUROPE: A COMPARATIVE REVIEW 73-74 (2006) (describing the “style” of French judgments as “simply giv[ing] a result, which follows from the rule,” “but not . . . provid[ing] the reasons,” in a manner “more like the minutes of a committee meeting, which do not attempt to summarise the debates that went on before the decision was reached”); BOBEK, *supra* note 11, at 97-99 (dubbing the French judicial style “the example[] of a legal tradition which hides more than it explicitly tells,” and noting that legislation is “essentially the only visible authority to which a French judicial decision is allowed to refer”); LASSER, *supra* note 51, at 31-35 (observing that the manner in which French *Cour de cassation* decisions are written “effectively denies access to anything but the numerical citation and the syllogistic application of the codified law”); *id.* at 329-30 (discussing how French legal theory denies judicial decisions the status of “law”). To some degree, Dutch and Italian judicial opinions share similar characteristics. See Gelter & Siems, *supra* note 11, at 253 (noting that “some courts may not be able to cite foreign law (or even anything else beside the applicable codes and statutes) openly, either due to a legal prohibition or to a social constraint,” and that “[t]his seems to be the case particularly in France and Italy”); Elaine Mak, *Why Do Dutch and UK Judges Cite Foreign Law?*, 70 CAMBRIDGE L.J. 420, 430-31 (2011) (observing that the Dutch Supreme Court was historically influenced by the French *Cour de cassation* and tends to render short opinions that do not cite foreign law, even if foreign materials were considered).

By contrast, the German legal tradition—to which the Japanese, Korean, and Taiwanese legal systems all trace their roots—is “relatively open” to consideration of a wide range of sources. BOBEK, *supra* note 11, at 120. According to a member of Germany’s Federal Constitutional Court (the *Bundesverfassungsgericht*), “[t]here are no fundamental objections against referring to international and foreign sources in German courts in general or the Constitutional Court in particular,” and the Constitutional Court consults the work of other courts “extensively.” Bryde, *supra* note 11, at 296-97. Notwithstanding its willingness to consider foreign law in its deliberations,

result, judicial *citation* of foreign law may be poorly correlated with judicial *usage* of foreign law.⁵³

Second, courts can and do use foreign law in ways that have little, if any, influence on the opinions they issue. Most scholarship on judicial usage of foreign law focuses on the kind of usage that manifests itself explicitly or implicitly in judicial decisions.⁵⁴ There are other ways, however, in which courts make use of foreign law. For example, courts have been known to establish research institutes dedicated to comparative law, publish translations of judicial opinions, issue reports about foreign law, join international organizations, and host international conferences. All of these activities constitute judicial usage of foreign law in the sense that they involve deliberate exposure to, or dissemination of, foreign law. It is not always the case, however, that these activities occur primarily or exclusively for the purpose of enriching judicial deliberations or adorning judicial opinions with foreign citations. Creation of a research institute that specializes in foreign law might be intended, for instance, to enhance a court's international prestige and influence, or to facilitate legislative or constitutional reform activities by other government institutions, or to create a repository of knowledge for the benefit of the general public.⁵⁵

In short, it is difficult to measure judicial usage of foreign law using quantitative techniques because neither the frequency nor the range of usage can be reliably observed simply by reading judicial decisions. A qualitative case study approach that involves in-depth investigation of a

however, the *Bundesverfassungsgericht*'s style of reasoning generally excludes the citation of foreign law. See BOBEK, *supra* note 11, at 141 (counting only three comparative references among all of the court's published decisions in 2008); Bryde, *supra* note 11, at 297 (observing that the court's tendency to cite "only its own precedents" has resulted in "a huge gap between the sources of the decision cited and those actually influencing the judges").

⁵³ See Law & Chang, *supra* note 11, at 527 (warning that "the frequency with which a court cites foreign law in its opinions is an extremely unreliable measure of the extent to which the court actually makes use of foreign law").

⁵⁴ See, e.g., JACKSON, *supra* note 19, at 17-102 (calling upon judges to "engage" with foreign law by evaluating whether, and to what extent, foreign law holds valuable lessons for domestic jurisprudence).

⁵⁵ The research institute established by the KCC, for instance, publishes reports on foreign law but has no responsibility for performing foreign legal research in connection to pending cases; such research is handled by an entirely different set of foreign law specialists. Thus, whatever purpose the institute actually serves, the connection between the creation of the institute and the adjudication of actual cases is tangential at best. See *infra* subsection III.D.6 (discussing the KCC's creation of a Constitutional Research Institute that performs comparative constitutional research unrelated to pending cases); see also, e.g., Gelter & Siems, *supra* note 11, at 240 (noting that the French *Cour de cassation*, which rarely cites foreign law explicitly in its own decisions, issues an annual report that "regularly considers developments in other jurisdictions").

specific court is, in theory, well suited to overcoming this type of problem.⁵⁶ However, a case study approach suffers from potential drawbacks of its own. If the cases selected for study are too different in too many ways, it becomes impossible to attribute similarities or differences across cases to any specific variable.⁵⁷ Ideally, one would compare cases that share many background characteristics in order to isolate the effect of a smaller number of variables.

This Article addresses these challenges by employing what social scientists call a structured-focused comparison of most-similar and most-different cases, which seeks to combine the best of both worlds.⁵⁸ On the one hand, a case study approach permits the kind of probing investigation that is necessary to unearth accurate information about usage, as opposed to citation, of foreign law. Extended discussion with court personnel who possess first-hand knowledge is a particularly rich source of such information. On the other hand, the disadvantages of the case study approach can be mitigated through a combination of case selection and data collection strategies. Section I.A sets forth the logic behind the selection of most-similar and most-different cases, while Section I.B elaborates upon the structured-focused approach to data collection.

A. Case Selection: Most-Similar Versus Most-Different Cases

The reliability of the case study approach is inherently improved by collecting data on multiple countries rather than a single country, but the selection of Japan, South Korea, and Taiwan in particular has the further methodological advantages associated with comparing “most similar cases.”⁵⁹

⁵⁶ See Law & Chang, *supra* note 11, at 527 (urging “[s]cholars who wish to understand or measure a particular court’s usage of foreign law” to “supplement quantitative research methods, such as statistical analysis of citations to foreign law, with qualitative approaches that are capable of probing more deeply, such as interviews with court personnel”).

⁵⁷ See GARY KING, ROBERT O. KEOHANE & SIDNEY VERBA, *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* 104 (1994); Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 58–59 (2002); Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125, 135 (2005).

⁵⁸ See A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS 18 (Helen Keller & Alec Stone Sweet eds., 2008) (explaining the methodological merits of “structured-focused comparison,” and offering a fruitful example of its application to the study of courts); ALEXANDER L. GEORGE & ANDREW BENNETT, *CASE STUDIES AND THEORY DEVELOPMENT IN THE SOCIAL SCIENCES* 67–72 (2005) (explaining the origins and merits of “structured, focused comparison”).

⁵⁹ Hirschl, *supra* note 57, at 133–35 (observing that the selection of “most similar cases” is a “standard case selection principle[] in inference-oriented, controlled comparison in qualitative, ‘small-N’ studies” that “control[s] for variables or potential explanations that are not central to the study” and thus helps isolate the effect of the key variables of interest).

Selection of cases that share much in common makes it possible to isolate the effect of the differences that remain. Not only are all three countries geographically adjacent, but they also belong to the same legal and geopolitical groupings. All three are democracies with German-influenced civil law systems and similar ways of training and promoting judges. South Korea and Taiwan share the added similarities of being former Japanese colonies that received German law through a Japanese filter and subsequently experienced democratization and a renaissance of judicial review at roughly the same time in the late 1980s. Furthermore, all three countries are closely aligned with the United States in security and economic matters. Finally, none of the three countries possesses a constitutional provision that either endorses or limits judicial consideration of foreign or international law.⁶⁰

These similarities make it possible to rule out a number of explanations for variation among the three countries. A finding that one of the three courts makes greater use of foreign law than the others, for example, cannot be attributed to the existence of a career judiciary, the historical influence of German law, or close relations with the United States because those characteristics are common to all three countries. Likewise, because none of the three countries possess constitutional provisions that address judicial usage of foreign law, there is no possibility that the presence or absence of such provisions accounts for differences among the three countries.

The fourth case study, Hong Kong, is included for precisely the opposite reasons. An invaluable complement to the study of most similar cases is the study of most *different* cases.⁶¹ A combination of most similar and most different cases can rule out competing explanations in ways that an analysis of most similar cases alone cannot. Suppose, for example, that three highly similar courts both engage heavily in comparativism, but it is unclear which (if any) of their many shared characteristics explains their behavior. If a fourth court that shares only one of those characteristics behaves the same way, that characteristic becomes more plausible as an explanation.⁶² Alterna-

⁶⁰ See *supra* note 47 (noting provisions in the constitutions of South Africa and Zimbabwe that explicitly authorize judicial usage of foreign law). As an empirical matter, it is far from clear whether the existence of such provisions actually affects the degree to which courts use foreign law. See Kalb, *supra* note 11, at 425 (observing that the degree of judicial "engagement with foreign and international law does not seem to vary measurably" as between countries that possess or lack constitutional provisions addressing the use of foreign law).

⁶¹ See Hirschl, *supra* note 57, at 139-42 (explaining the logic of the "most different cases" approach).

⁶² See *id.* at 139-41 (observing that analysis of "most different" cases can isolate and emphasize the explanatory power of the few "key independent variables" that the cases share in common).

tively, if a fourth court shares none of those characteristics in common yet still behaves the same way, then the explanation must be sought elsewhere.

Within East Asia, Hong Kong fills the role of a most different case. As a wealthy, industrialized society, it shares enough in common with the other three jurisdictions that comparisons can plausibly be made. The inclusion of Hong Kong in the analysis also rounds out the list of jurisdictions with judicial review in East Asia and yields a relatively comprehensive picture of the region as a whole.⁶³ In numerous respects, however, Hong Kong is unlike the other three cases. It belongs to different legal and geopolitical families: whereas Japan, Korea, and Taiwan all possess a German legal tradition and rely upon the United States for their security, Hong Kong has a strongly British legal tradition and forms part of China. Unlike the others, Hong Kong is not a sovereign state but instead a “Special Administrative Region” of China that enjoys heightened autonomy.⁶⁴ One aspect of this autonomy is that Hong Kong’s courts are not answerable or inferior to any court in mainland China.⁶⁵ Hong Kong is therefore unusual within East Asia, and indeed globally, in combining vigorous judicial review by independent courts with a lack of democratic self-rule⁶⁶ and oversight by an authoritarian central government.⁶⁷ Finally, Hong Kong’s constitution

⁶³ The only East Asian country with judicial review that this Article does not cover is Mongolia. See TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 164–200 (2003) (describing the often vigorous practice of judicial review in Mongolia).

⁶⁴ See XIANGGANG JIBEN FA, art. 2 (H.K.) (authorizing the HKSAR to “exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power”); Danny Gittings, *Hong Kong’s Courts Are Learning to Live with China*, 19 H.K. J., July 2010, at 1, 1, available at <http://hub.hku.hk/bitstream/10722/193248/1/Content.pdf> (describing the 1984 agreement, the Sino–British Joint Declaration, “under which Britain agreed to restore Hong Kong to China in 1997, in return for generous promises about the high degree of autonomy Hong Kong would enjoy under a ‘one country, two systems’ formula”).

⁶⁵ See Gittings, *supra* note 64, at 1 (describing the HKCFA’s existence and power of final adjudication as “a key part of the deal struck between London and Beijing in 1984” that was subsequently enshrined in the Sino–British Joint Declaration).

⁶⁶ Only half of Hong Kong’s relatively weak legislature, the Legislative Council, is directly elected, while the head of the government, the Chief Executive, is selected by interest groups or “functional constituencies” that are largely sympathetic to China from a list of candidates approved by Beijing. See DANNY GITTINGS, INTRODUCTION TO THE HONG KONG BASIC LAW 107–13 (2013) (explaining why the “functional constituency” system for selecting Hong Kong’s Chief Executive confers outsized influence upon a “small circle” of roughly 200,000 voters and prevents pro-democracy candidates from winning); *id.* at 129–40 (describing how the Standing Committee of the National People’s Congress blocked the introduction of universal suffrage for Legislative Council elections, and observing that the “functional constituency” system empowers “economically important but numerically small” groups).

⁶⁷ See STANDING COMM. NAT’L PEOPLE’S CONG., DECISION OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE’S CONGRESS ON ISSUES RELATING TO THE SELECTION OF THE CHIEF EXECUTIVE OF THE HONG KONG SPECIAL ADMINISTRATIVE

contains several provisions that explicitly authorize or contemplate judicial usage of foreign and international law.⁶⁸

B. *Data Collection: A Structured-Focused Approach*

This case selection strategy of combining most-similar and most-different cases is paired with a “structured-focused” approach to data collection, meaning that the investigation of each case is structured around the same set of questions.⁶⁹ For each of the four courts, the following questions are addressed sequentially: (1) the level of each court’s foreign law usage, (2) the level of each court’s foreign law expertise, (3) the jurisdictions most frequently considered by each court, (4) the mechanisms that each court possesses for learning about foreign law, and (5) the extent of each court’s interaction with foreign courts. The table at the end of this Article provides further structure and focus for the data by summarizing and contrasting the relevant institutional characteristics of the four East Asian courts plus the U.S. Supreme Court. Use of a structured-focused approach ensures that similar data is collected on each court and facilitates inferences about the effect of a consistent set of variables. This approach also yields benefits for the overall study of courts and comparativism: it promotes the development of a cumulative body of scholarship by furnishing a template for data collection on additional countries and courts.

The data for the case studies were collected as follows. In Japan, interviews were conducted in 2008, 2009, and 2013 with a variety of judges, officials, and scholars, including eight sitting and retired members of the JSC itself; two judges assigned to the JSC as research judges or *chōsakan*, who perform the functions of law clerks; and judges sent abroad to study foreign law at government expense. Likewise, the original data in this article on the KCC derive from interviews conducted by the author in 2011, 2013, and 2014 with a combination of judges, officials, and scholars, including a retired member of

REGION BY UNIVERSAL SUFFRAGE AND ON THE METHOD FOR FORMING THE LEGISLATIVE COUNCIL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION IN THE YEAR 2016, at 3-4 (Aug. 31, 2014), available at <http://www.2017.gov.hk/filemanager/template/en/doc/20140831a.pdf> (requiring the screening of candidates for Chief Executive of Hong Kong by a “nominating committee” dominated by interest groups sympathetic to Beijing on the grounds that “the Chief Executive has to be a person who loves the country [China] and loves Hong Kong”); Tony Cheung et al., *Beijing Emphasises Its Total Control over HK*, S. CHINA MORNING POST (H.K.), June 10, 2014, at A1 (describing the position formally taken by China’s State Council that Hong Kong’s “high degree of autonomy” is itself “subject to the central government’s authorisation,” and that it remains the central government’s prerogative to oversee Hong Kong’s government).

⁶⁸ See *infra* notes 251-53 and accompanying text.

⁶⁹ A EUROPE OF RIGHTS, *supra* note 58, at 18; see also GEORGE & BENNETT, *supra* note 58, at 67-72.

the KCC; three senior officials responsible for relations with foreign courts and oversight of legal research; three Constitutional Research Officers (the Korean equivalent of law clerks); a researcher at the newly established Constitutional Research Institute, a subsidiary of the KCC; several judges sent abroad by the Korean judiciary to study foreign law; a prosecutor; and several scholars with prior judicial experience. The bulk of the fieldwork in Taiwan consisted of confidential, face-to-face interviews conducted in 2011 and 2014 with thirteen current and former justices of the TCC and ten current and former law clerks.⁷⁰ In Hong Kong, interviews were conducted in 2014 with three members of the HKCFA, two law clerks at the HKCFA, two former lower-court judges, and a variety of local scholars and attorneys.

II. THE JAPANESE SUPREME COURT

A. *Level of Foreign Law Citation*

The JSC rarely cites foreign law in its decisions. A recent empirical analysis suggests that actual citations to foreign precedent appear in roughly 5% of the JSC's constitutional decisions.⁷¹ The rarity of explicit citations to foreign precedent reflects in part the fact that, compared to a common law court such as the U.S. Supreme Court, the JSC writes relatively concise, lightly footnoted opinions in a style more characteristic of many civil law courts.⁷²

B. *Level of Foreign Law Usage*

Like the KCC and TCC, the JSC is significantly more likely to perform foreign law research than to cite foreign law in its opinions. Unlike the KCC or TCC, however, the JSC has neither routinized nor institutionalized the practice of researching foreign law. The overall attitude at the JSC

⁷⁰ The interviews in Taiwan were conducted by the author, on some occasions in conjunction with Professor Wen-Chen Chang and once with the participation of Professor Carol Lin, in a combination of Mandarin and English tailored to the interviewees. Professor Chang was a law clerk to former Chief Justice Weng Yueh-Sheng of the TCC but is not included in the count of interviewees.

⁷¹ See Akiko Ejima, *A Gap Between the Apparent and Hidden Attitudes of the Supreme Court of Japan Towards Foreign Precedents* (identifying 11 cases in which foreign law was cited, out of a total of 234 constitutional cases decided from 1990 through mid-2008), in *THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES*, *supra* note 11, at 273, 277, 283.

⁷² See *supra* notes 51-52 and accompanying text (contrasting the opinion-writing and citation practices of civil law and common law courts).

toward such research is perhaps best described as one of indifference, rather than either enthusiasm or hostility.

On the one hand, consideration of foreign law is distinctly uncontroversial. None of the justices I interviewed could think of any case in which a judge or justice had resisted or criticized the consideration of foreign approaches to a particular legal question. This lack of resistance to comparative legal analysis was attributed to the fact that Japanese law is itself of largely foreign origins. Those foreign origins are primarily German, but American influence is also obvious in the area of constitutional law.⁷³ In the words of one justice, there is “nothing to prevent” the JSC from engaging more heavily in comparative analysis.⁷⁴

On the other hand, neither the justices nor the clerks perform foreign legal research as a matter of course. Several justices echoed the sentiment that foreign legal research is “neither encouraged nor discouraged” but is instead conducted when “necessary for the case,”⁷⁵ and in most cases, it is “not so necessary.”⁷⁶ By their own account, Japanese judges are, for the most part, “not so interested” in foreign law. The fact that lawyers tend not to employ foreign law in their briefs and arguments to the JSC also contributes to the JSC’s “limited motivation” to learn about foreign law.⁷⁷ One justice characterized the JSC’s use of foreign law as “far behind compared to global standards.”⁷⁸

When foreign legal research does occur, it may occur either upon the initiative of a law clerk⁷⁹ or at the request of a particular justice. Whether foreign law research is considered “necessary” varies with both the area of law and the specific topic under consideration. My sources estimated that foreign legal research is conducted in less than 10% of cases; according to one justice, the total is perhaps “less than 1%” of all cases heard, amounting

⁷³ See David S. Law, *The Myth of the Imposed Constitution* (discussing American involvement in the drafting of Japan’s post-war constitution and the consequent characterization of the Japanese constitution as “imposed”), in *SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* 239, 242-44 (Denis J. Galligan & Mila Versteeg eds., 2013).

⁷⁴ Interview with Justice F, Current or Former Member of the Supreme Court of Japan, in Tokyo, Japan (July 17, 2013).

⁷⁵ Interview with Justice H, Current or Former Member of the Supreme Court of Japan, in Tokyo, Japan (July 17, 2013).

⁷⁶ Interview with Justice A, Current or Former Member of the Supreme Court of Japan, in Tokyo, Japan (July 17, 2013).

⁷⁷ Interview with Justice F, *supra* note 74.

⁷⁸ *Id.*

⁷⁹ See David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545, 1579 (2009) (describing how successful career judges are recruited by the judicial bureaucracy to serve as law clerks, or *chōsakan*, on the JSC for several years).

to “a few occasions per year.”⁸⁰ However, these estimates reflect usage of foreign law across the JSC’s entire docket.⁸¹ Unlike either the TCC or KCC, the JSC is a court of general jurisdiction, and only a small fraction of its docket consists of constitutional cases.⁸² Several justices agreed that the JSC is more likely to consider foreign law in constitutional cases than in other areas of law,⁸³ but as one justice observed, the court is typically confronted with a “lack of important constitutional litigation,” which may help to explain its overall lack of foreign law usage.⁸⁴

Not only the composition, but also the sheer size of the JSC’s docket may have consequences for its usage of foreign law. As Japan’s highest court of general jurisdiction, the JSC faces a massive docket of over 12,000 cases annually,⁸⁵ most of which it lacks discretion to reject.⁸⁶ Even though Japan has only one-third the population of the United States, the JSC’s docket is even greater than that of the U.S. Supreme Court⁸⁷ (which, unlike the JSC,

⁸⁰ Interview with Justice H, *supra* note 75.

⁸¹ For most purposes, the JSC divides its docket into civil, criminal, and administrative cases and does not track constitutional cases as a distinct category. *See infra* note 85 (citing official court statistics that employ these three categories).

⁸² Professor Ejima’s analysis of the 15,885 JSC decisions rendered from 1990 through mid-2008 and included in the TKC database found only 234 cases (or 1.5% of the total) that contained any mention of the Japanese Constitution. *See* Ejima, *supra* note 71, at 275, 277. One judge who worked at the JSC as a *chōsakan* for nearly five years indicated that he encountered fewer than twenty-five cases in total that involved a constitutional question.

⁸³ *See* Interview with Justice H, *supra* note 75; Interview with Justice F, *supra* note 74. Other areas of more frequent foreign law usage reportedly include intellectual property cases and, increasingly, corporate law cases. *See id.*

⁸⁴ Interview with Justice F, *supra* note 74.

⁸⁵ In 2012, the most recent year for which the JSC has released statistics as of this writing, the JSC received 12,311 new cases (8169 civil and administrative cases and 4142 criminal cases) and decided 12,594 existing cases (8336 civil and administrative cases and 4258 criminal cases). *See* SUPREME COURT OF JAPAN, CIVIL AND ADMINISTRATIVE CASES: NEWLY FILED, RESOLVED, AND PENDING, *available at* <http://www.courts.go.jp/sihotokei/nenpo/pdf/B24DMIN1-1.pdf> (reporting the numbers of civil and administrative cases filed and decided in 2012); SUPREME COURT OF JAPAN, CRIMINAL AND OTHER CASES: NEWLY FILED, RESOLVED, AND PENDING, *available at* <http://www.courts.go.jp/sihotokei/nenpo/pdf/B24DKEI01.pdf> (reporting the numbers of criminal cases filed and decided in 2012).

⁸⁶ *See* HIROSHI ITOH, THE SUPREME COURT AND BENIGN ELITE DEMOCRACY IN JAPAN 47 (2010) (noting that 1996 revisions of the Japanese civil code that were intended to increase the JSC’s discretion over its civil docket have failed to significantly alleviate the JSC’s workload); John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust* (noting that, “[u]nlike the United States Supreme Court and most state supreme courts in the United States,” the JSC “does not exercise any significant discretion over its docket”), in *LAW IN JAPAN: A TURNING POINT* 99, 105 (Daniel H. Foote ed., 2007); Law, *supra* note 79, at 1577–78 (detailing the JSC’s “overwhelming” docket, which rivals that of the U.S. Supreme Court in absolute size but consists largely of cases that the JSC cannot decline to hear).

⁸⁷ *See The Justices’ Caseload*, SUP. CT. U.S., <http://www.supremecourt.gov/about/justicecaseload.aspx> (last visited Feb. 28, 2015), *archived at* <http://perma.cc/3WFE-2CDW>.

can and does dismiss the vast majority of its cases at will) and far greater than that of either the KCC or the TCC (which receive roughly 1500⁸⁸ and 500⁸⁹ petitions per year, respectively). All other things being equal, the more cases that a court must hear, the less time that it can spend per case, and the less likely that it can afford to perform foreign legal research. Nevertheless, docket pressure alone cannot explain the JSC's modest use of foreign law. Both the Israeli Supreme Court and the Indian Supreme Court, for example, face daunting caseloads,⁹⁰ yet both are known for engaging in comparative analysis.⁹¹

Consideration of foreign law becomes more likely if another court is known for its extensive jurisprudence on a topic with which the JSC itself has relatively little experience. The leading example is electoral malapportionment. In 1976, the JSC declared unconstitutional an electoral apportionment scheme for the legislative lower house that weighted rural voters five times as heavily as urban voters.⁹² To date, the 1976 malapportionment

⁸⁸ In 2013, the KCC received 1480 new cases and disposed of 1585 existing cases. *See Case Statistics of the Constitutional Court of Korea*, CONST. CT. KOREA, <http://english.court.go.kr/cckhome/eng/decisions/caseLoadStatic/caseLoadStatic.do> (last visited Feb. 28, 2015), *archived at* <http://perma.cc/UH4T-SJTK> (reporting the cumulative number of cases filed and decided through the present); *see also* CONSTITUTIONAL COURT OF KOREA, TWENTY YEARS OF THE CONSTITUTIONAL COURT OF KOREA 121 (reporting an annual average of 1214 filings from September 1988 through August 2007). A backlog of cases means that it is possible for the KCC to decide more cases in a given year than it receives.

⁸⁹ *Justices of the Constitutional Court: Cases Commenced, Terminated, and Pending*, DEP'T STAT. JUD. YUAN, <http://www.judicial.gov.tw/juds/report/eg-1.htm> (last visited Feb. 28, 2015), *archived at* <http://perma.cc/J594-SBQ4>.

⁹⁰ *See* Suzie Navot, *Israel: Creating a Constitution—The Use of Foreign Precedents by the Supreme Court (1994–2010)* (noting that the Israeli Supreme Court “is the first, last, and only” court in Israel with jurisdiction over most disputes concerning “government institutions and state organs” or “between citizens and the State”), *in* THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES, *supra* note 11, at 129, 136; Nick Robinson, *A Quantitative Analysis of the Indian Supreme Court's Workload*, 10 J. EMPIRICAL LEGAL STUD. 570, 578–79 (2013) (reporting that the Indian Supreme Court currently receives roughly 70,000 filings per year).

⁹¹ *See* Navot, *supra* note 90, at 135 (noting that over 20% of the Israeli Supreme Court's citations over the period from 1948 to 1994 were to foreign law); *id.* at 141–42 (reporting that over the period from 1994 to 2010, roughly one in three of the Israeli Supreme Court's constitutional decisions cited foreign law); Adam M. Smith, *Making Itself at Home: Understanding Foreign Law in Domestic Jurisprudence: The Indian Case*, 24 BERKELEY J. INT'L L. 218, 239–40 (2006) (finding that the Indian Supreme Court referred to foreign law in roughly one-quarter of its decisions between 1950 and 2005); Alexander Somek, *The Deadweight of Formulae: What Might Have Been the Second Germanization of American Equal Protection Review*, 1 U. PA. J. CONST. L. 284, 284 n.1 (1998) (characterizing the Israeli Supreme Court as “the most important comparative constitutional law institute of the world,” and giving credit to the court's “practice of employing clerks from all over the world, who do the research work on their country of origin”).

⁹² *See* Law, *supra* note 79, at 1547–48 (discussing *Kurokawa v. Chiba Prefecture Election Control Commission*, Saikō Saibansho [Sup. Ct.] Apr. 14, 1976, 30 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 223 (Japan)).

decision is one of only nine cases in which the JSC has ever held a law unconstitutional, and it remains the most momentous decision rendered by the court since its establishment in 1947.⁹³ At the time of the decision, the JSC knew that the U.S. Supreme Court had already compiled a significant body of jurisprudence on the issue of electoral malapportionment, but the manner in which the JSC became aware of the relevant American case law stands as a lesson in the importance of in-house foreign legal expertise. In 1976, the chief *chōsakan* at the JSC, Jiro Nakamura, was a common law expert and was familiar in particular with the U.S. Supreme Court's landmark decisions in *Baker v. Carr*⁹⁴ and *Reynolds v. Sims*.⁹⁵ Nakamura was reportedly responsible for introducing both cases to the members of the JSC.⁹⁶

C. Jurisdictions Considered

To the extent that the JSC considers foreign case law, it is most likely to evaluate the jurisprudence of the U.S. Supreme Court, the German *Bundesverfassungsgericht*, and in recent years the European Court of Human Rights (ECtHR).⁹⁷ Interest in German jurisprudence is a natural consequence of the extent to which Japanese law is modeled on German law, while the extensive role played by the American occupation in the drafting of Japan's post-war constitution makes American constitutional jurisprudence of particular interest in Japan. Notably absent from the list are two courts from the English-speaking world, the Canadian Supreme Court and South African Constitutional Court, both of which enjoy a reputation in the English-language comparative constitutional literature for exporting their constitutional jurisprudence.⁹⁸

⁹³ See *id.* (counting eight cases as of 2009 in which the JSC had struck down a law as unconstitutional). In late 2013, the JSC held a law unconstitutional for only the ninth time since its establishment in 1947. See Tomohiro Osaki & Reiji Yoshida, *Top Court Shoots Down Unequal Inheritance Rights*, JAPAN TIMES (Sept. 4, 2013), www.japantimes.co.jp/news/2013/09/04/national/top-court-shoots-down-unequal-inheritance-rights, archived at <http://perma.cc/KK7Q-DKB5> (describing the JSC's decision to overrule several earlier decisions and hold unconstitutional a provision of the Civil Code that limits illegitimate children to one-half the inheritance of legitimate children). Prior to the 2013 case, the last time the JSC struck down a law was in 2008, in a case that also involved explicit formal discrimination against illegitimate children. That case involved eligibility for citizenship as opposed to inheritance. See Law, *supra* note 79, at 1547.

⁹⁴ 369 U.S. 186 (1962).

⁹⁵ 377 U.S. 533 (1964).

⁹⁶ See Interview with Justice F, *supra* note 74.

⁹⁷ See, e.g., *id.*; Interview with Justice H, *supra* note 75.

⁹⁸ See, e.g., SLAUGHTER, *supra* note 12, at 74 (singling out the South African Constitutional Court and the "Canadian Constitutional Court" [sic] as "disproportionately influential" and "highly influential, apparently more so than the U.S. Supreme Court and other older and more established constitutional courts"); Melissa A. Waters, *Mediating Norms and Identity: The Role of*

Although the justices themselves are generally not avid consumers of legal scholarship, one justice explicitly credited the expansion of comparative constitutional scholarship in Japan for increasing both the degree to which the JSC performs foreign legal research and the range of jurisdictions that the JSC considers.⁹⁹ Scholarly translation and analysis of foreign law is facilitating the citation of foreign law by lawyers, which in turn makes it more likely that the *chōsakan* and the justices will consider it “necessary” to conduct their own research into foreign law.

D. Level of Foreign Law Expertise

The Japanese judiciary has a longstanding practice of sending promising recruits abroad to study foreign law. Even so, however, the justices and clerks of the JSC tend on average to possess less foreign legal expertise than their Korean, Taiwanese, or Hong Kong counterparts, as summarized below in Table 1.

The beginnings of this practice were modest. In the early 1960s, Japan sent one judge per year to the United States to earn an LL.M. with the support of the Fulbright Foundation, and Germany was subsequently added as a destination with a combination of private and public funding.¹⁰⁰ The scope of the study-abroad program has grown substantially over time. In any given year, the judiciary will recruit roughly 100 to 120 judges from its in-house training institute.¹⁰¹ From this number, approximately thirty will be selected by the judicial bureaucracy early in their careers to study

Transnational Judicial Dialogue in Creating and Enforcing International Law, 93 GEO. L.J. 487, 558 n.316 (2005) (identifying the Canadian Supreme Court as “one of the most influential domestic courts worldwide on human rights issues”); Adam Liptak, *U.S. Court, a Longtime Beacon, Is Now Guiding Fewer Nations*, N.Y. TIMES, Sept. 18, 2008, at A1 (noting that many legal scholars have “singled out” the Canadian Supreme Court and South African Constitutional Court as “increasingly influential”).

⁹⁹ See Interview with Justice F, *supra* note 74; cf. Giorgio Fabio Colombo, *Japan as a Victim of Comparative Law*, 22 MICH. ST. INT’L L. REV. 731, 747 (2014) (observing that “almost every Japanese law professor reads (and very often speaks fluently) at least one, but often more than one foreign language among German, English and French, and has a deep knowledge of a foreign jurisdiction,” and arguing that “Japanese legal scholars are probably the best comparative lawyers in the world”).

¹⁰⁰ See Interview with Justice A, *supra* note 76; Interview with Justice F, *supra* note 74.

¹⁰¹ The *Shiho Kensyujō*, or Legal Training and Research Institute (LTRI), is a mandatory training program operated by the judiciary at government expense for those who pass the Japanese bar examination. Judges and prosecutors are recruited directly from the LTRI. See Law, *supra* note 79, at 1552.

abroad.¹⁰² At least half of that group goes to the United States, while the remainder is typically distributed among the United Kingdom, Canada, Germany, France, and perhaps also Australia.

At present, the majority of Japanese judges who study abroad do so as visiting scholars or court observers rather than degree candidates.¹⁰³ Of the roughly twenty judges studying abroad in the United States in the 2013–2014 academic year, three-quarters took up residence at law schools as visiting scholars, while the remainder were assigned to courts in various cities as observers.¹⁰⁴ The General Secretariat, the administrative arm of the JSC, maintains a list of approximately fifteen American law schools that have regularly accepted Japanese judges as visiting scholars and are approved destinations.¹⁰⁵ Although being sent abroad to study is no longer as exceptional as it once was, it is still considered a sign of professional promise and distinction.

The practice of sending judges abroad has borne at least some fruit in the area of constitutional law. Several prominent judges who studied abroad, such as Jiro Nakamura, Yasuo Tokikuni, and Kojo Toshimaro, became known for importing ideas from American constitutional litigation to Japan, as in the case of the 1976 electoral malapportionment decision.¹⁰⁶ There have also been instances in which the JSC's law clerks—who are themselves elite career judges assigned to the JSC on a temporary basis¹⁰⁷—have exposed the justices to foreign ideas and ways of thinking.¹⁰⁸

Nevertheless, the overall impact of the study-abroad program on the judiciary and the JSC in particular appears to be limited. The General Secretariat's objectives in sending judges abroad are to “widen their views” and expose them to foreign legal systems that have influenced Japanese

¹⁰² Judges are selected for study abroad by the *Jimusōkyoku* or General Secretariat of the Supreme Court, the powerful administrative arm of the judiciary that also selects judges to serve as *chōsakan* on the JSC and to work at the General Secretariat itself. *See id.* at 1556–58.

¹⁰³ *See* Interview with Judge 7, Japanese District Court Judge, in Location Concealed (Sept. 10, 2013) (estimating that roughly twenty of the hundred or so members of his judicial cohort studied in the United States as visiting scholars, while only five or six did so as LL.M. candidates).

¹⁰⁴ *See id.*

¹⁰⁵ *See id.* In years past, the few judges who went abroad typically did so as LL.M. candidates. *See* Interview with Justice A, *supra* note 76. Today, a relatively small number who undergo a more rigorous selection process that includes a competitive examination still have the opportunity to earn an LL.M. at government expense. *See* Interview with Judge 7, *supra* note 103.

¹⁰⁶ *See supra* text accompanying notes 92–96.

¹⁰⁷ *See* Law, *supra* note 79, at 1556–57, 1579.

¹⁰⁸ *See id.* at 1583 n.241 (recounting the story of one justice's exposure to the constitutional theory of John Hart Ely courtesy of a law clerk).

law.¹⁰⁹ Several justices opined that, in reality, most judges have little opportunity to retain their foreign language skills after returning to Japan and become largely indistinguishable from those who were never sent abroad. In addition, relatively few of the justices themselves are likely to be alumni of the judiciary's study-abroad program. The fifteen seats on the court are allocated among different segments of the legal profession on the basis of an informal quota system, and under current practice, six of the fifteen justices are selected from the ranks of the career judiciary.¹¹⁰ It is thus unlikely that more than one or two of those justices at any given time will have personally taken advantage of the study-abroad program.

The remaining nine justices may be exposed to foreign law in other ways. Typically, four of the nine are former attorneys from private practice, two are former prosecutors, two are former government bureaucrats, and one is a former law professor.¹¹¹ The frequent practice of selecting a former diplomat to occupy one of the two seats allocated to the bureaucracy has both the goal and the effect of equipping the court with native expertise in international law.¹¹² It is also not unusual for one of the former attorneys on the court to have practiced international business law. The academic on the court is especially likely to have extensive exposure to foreign law. Law professors in Japan are much more likely to engage in comparative legal scholarship and to possess foreign legal training than their American counterparts,¹¹³ and a number of the professors to have served on the JSC have been renowned for their expertise in foreign law. Regardless of how they acquire foreign legal expertise, however, the justices who already possess such expertise are also the ones who are most likely to "go to the library themselves" to research foreign law.¹¹⁴

The *chōsakan*, elite career judges who are selected by the General Secretariat to assist the JSC for several years as law clerks,¹¹⁵ are neither required nor expected to possess foreign legal training or foreign language skills.

¹⁰⁹ Interview with Justice D, Current or Former Member of the Supreme Court of Japan, in Tokyo, Japan (July 19, 2013).

¹¹⁰ See Law, *supra* note 79, at 1551, 1564-74 (elaborating at length upon the manner in which seats on the JSC are filled in practice).

¹¹¹ See *id.* at 1568-69.

¹¹² See *id.* at 1571.

¹¹³ See Colombo, *supra* note 99, at 747 ("[A]lmost every Japanese law professor reads (and very often speaks fluently) at least one, but often more than one foreign language ... and has a deep knowledge of a foreign jurisdiction among the most 'prestigious': France, Germany, England or the US."); *infra* Table 1 (contrasting the foreign educational credentials of constitutional law professors at elite Japanese and American law schools).

¹¹⁴ Interview with Justice F, *supra* note 74.

¹¹⁵ See Law, *supra* note 79, at 1557.

However, the fact that a particular judge has studied abroad is considered an “advantage” for purposes of *chōsakan* recruitment.¹¹⁶ In addition, the General Secretariat reportedly attempts to ensure that the JSC has at least one German-trained and one French-trained *chōsakan* (out of a total of thirty-seven) to address any needs for German or French legal research that may arise. In recent years, roughly half of the *chōsakan* at any given time are likely to have studied law overseas, a fact that reflects both the growing scope of the judiciary’s study-abroad program and the recruitment advantage enjoyed by alumni of the program. Most of the former *chōsakan* interviewed by the author reported that they had at some point performed foreign legal research, either upon their own initiative or at the request of a justice.

E. *Level of Interaction with Foreign Courts*

The JSC’s level of interaction with foreign courts falls between the extremes of the TCC, which is frequently thwarted by Taiwan’s lack of diplomatic recognition,¹¹⁷ and the KCC and HKCFA, both of which possess strong institutional ties to courts elsewhere.¹¹⁸ Members of the JSC have regular opportunities to make official visits to foreign courts and jurisdictions. Each year, five of the fifteen justices are eligible to take a one-week overseas trip at the court’s expense. Their destinations have run the gamut from the usual suspects (such the U.S. Supreme Court and the ECtHR) to courts that are somewhat off the beaten path, such as the Supreme Court of the Vatican City State, the Supreme Constitutional Court of Egypt, the U.S. District Court for the Northern District of Illinois, and the Constitutional Court of Slovenia.

The extent to which individual justices actually travel overseas varies widely. In this respect, the JSC is probably no different from any other court.¹¹⁹ Over the course of roughly a decade on the JSC, one exceptionally well-traveled justice met judges from twenty-eight countries and visited every continent except South America, but this individual had served as a diplomat prior to joining the court and was by all accounts highly atypical.

¹¹⁶ Interview with Justice F, *supra* note 74.

¹¹⁷ See Law & Chang, *supra* note 11, at 540-43, 548-57 (describing Taiwan’s diplomatic isolation and various consequences for the judiciary of this isolation); *infra* Section IV.E.

¹¹⁸ See *infra* Sections III.E, V.E.

¹¹⁹ The same could be said, for example, of European courts. See BOBEK, *supra* note 11, at 50 (observing of Continental courts that “it tends to be always the same few members of the court who participate in the various international meetings”). Particular justices may have unique responsibilities that demand greater travel, such as the KCC member who represents South Korea before the Venice Commission, or the TCC member who played a leadership role in the International Association of Women Judges.

A more typical member of the JSC might journey abroad every other year. Several justices cited the pressures of the JSC's enormous docket as a factor preventing more frequent travel.¹²⁰

Like many other courts, the JSC regularly welcomes judicial visitors from other countries, although its efforts at affirmative outreach pale in comparison to those of the KCC. The JSC does host a prominent legal figure from abroad on an annual basis. Past guests have included the chief justices of the United Kingdom Supreme Court, the French *Cour de cassation*, the German Supreme Court, the ECtHR, and the U.S. Supreme Court. The guest is typically selected on the basis of group discussion among the fifteen justices.

III. THE KOREAN CONSTITUTIONAL COURT

A. *Level of Foreign Law Citation*

It is relatively rare for the KCC to actually cite foreign law in its opinions. Sources inside the KCC estimated that foreign law, in the form of judicial precedent or otherwise, is explicitly cited in no more than 5 to 10% of decisions.¹²¹

B. *Level of Foreign Law Usage*

Although the KCC is reluctant to *cite* foreign law, it has embraced the *use* of foreign law. The degree to which the KCC has routinized and institutionalized foreign legal research is breathtaking. Its mechanisms for researching and analyzing foreign law range from specialized researchers hired specifically for their foreign legal credentials, to the establishment of a freestanding research institute that publishes comparative constitutional scholarship and monitors the work of constitutional courts around the world.

Sources inside the KCC gave estimates of how frequently foreign legal research is conducted that ranged from 60% of cases to "always."¹²² The decision to research foreign law in a given case is usually made by the Constitutional Research Officer (CRO) responsible for preparing the bench memorandum. As discussed below, CROs are roughly equivalent to law clerks but are significantly more experienced and much more likely to

¹²⁰ See *supra* notes 85-86 and accompanying text (discussing the size of the JSC's docket).

¹²¹ See, e.g., Interview with Official A, Current or Former Constitutional Research Officer of the Constitutional Court of the Republic of Korea, in Location Concealed (Feb. 25, 2011); Interview with Official B, Current or Former Constitutional Research Officer of the Constitutional Court of the Republic of Korea, in Seoul, Korea (July 6, 2011).

¹²² Interview with Judge 1, Korean District Court Judge, in Location Concealed (Date Concealed) (quoting a judge employed at the KCC).

possess foreign legal training than their American counterparts. On rare occasions—perhaps 5 to 10% of the time—foreign legal research will be performed at the specific request of a justice.¹²³

C. Jurisdictions Considered

The jurisdictions most often considered by the KCC are Germany, the United States, and Japan, in roughly that order. Interest in the case law of the ECtHR is growing, and research on French law is also conducted from time to time. The KCC's attention to German and Japanese law is partly a legacy of the imposition of Japanese law during the colonial period. Because Japanese law at the time was inspired by German law, Korean law borrows heavily but indirectly from German law as well. Research on German law is conducted at least half of the time.¹²⁴

American law receives attention in approximately 20% of cases and is especially likely to be considered in freedom of expression and habeas corpus cases. The lack of social and economic rights in the U.S. Constitution was identified by several sources as a factor that limits the relevance of American jurisprudence to the KCC. However, the use of American law is on the rise. Korean emphasis on the acquisition of English-language skills and interest in professional opportunities for American-trained lawyers have helped to tip the balance of foreign legal training away from German law toward American law. It is widely felt among younger Koreans, including law students, that English opens a wider range of professional opportunities than other languages such as German.

Japanese law is considered in a small, and declining, proportion of cases, in the neighborhood of 15%. Cases involving older statutes that date back to Japan's occupation of Korea continue to call for Japanese legal research. However, Japan was described as offering "little constitutional jurisprudence" and "little to learn" because the JSC is "too conservative" and "never strikes anything down."¹²⁵ Through the mid-1980s, the training curriculum for Korean judges included a Japanese language requirement. It is perhaps both a cause and a symptom of declining judicial interest in Japanese law that the requirement was abandoned in the late 1980s.

Like the JSC and TCC, the KCC appears to pay relatively little attention to courts from common law jurisdictions other than the U.S. Supreme Court.

¹²³ See Interview with Official A, *supra* note 121.

¹²⁴ See *id.*; E-Mail from Unnamed Official, Constitutional Court of the Republic of Korea, to author (Aug. 30, 2013, 03:37 EST) (on file with author).

¹²⁵ Interview with Official A, *supra* note 121.

Neither the Canadian Supreme Court nor the South African Constitutional Court was identified as a major influence or regular point of comparison. A recently retired justice opined that the KCC is “expanding its repertoire, slowly” and cited as evidence the deliberate recruitment of researchers to specialize in the European Court of Human Rights.¹²⁶ However, when asked about the actual impact of the ECtHR, a veteran court official indicated that its jurisprudence is considered “from time to time,” but “not that often.”¹²⁷

The holdings in the KCC’s library offer a rough but quantifiable proxy for the court’s interest in specific jurisdictions and in foreign law more generally. Of the roughly 125,000 volumes held by the library, 55% are of foreign origin.¹²⁸ The library’s constitutional law collection is skewed even more heavily in a comparative direction. German volumes make up 28% of the collection, while Korean volumes make up only 25.5%.¹²⁹ English-speaking jurisdictions (including the United States, the United Kingdom, and the rest of the Commonwealth) together contribute 18.6% of the total, while Japan by itself accounts for 16%. Leading the remainder are France with 5% and Austria with 1.3%.

D. *Level of Foreign Law Expertise*

The KCC’s means of learning about foreign legal systems are remarkably varied and extensive. Its repositories of foreign legal expertise include: (1) the justices who have studied overseas; (2) the permanent law clerks who possess foreign legal expertise; (3) the law clerks hired as specialists in foreign law; (4) the law professors who work for the court on a part-time basis; (5) experts hired by the parties; and (6) the newly established Constitutional Research Institute. Each will be discussed in turn.

1. The Justices Themselves

With respect to the proportion of its membership that has studied law abroad, the KCC falls between the JSC and the TCC. Four of the nine

¹²⁶ Interview with Justice A, Former Member of the Constitutional Court of the Republic of Korea, in Seoul, Korea (Sept. 6, 2011).

¹²⁷ Telephone Interview with Unnamed Official, Constitutional Court of the Republic of Korea (Aug. 22, 2013).

¹²⁸ The figures reported here were provided to the author by the KCC library’s circulation desk in the form of a spreadsheet dated October 30, 2014. As of that date, the KCC’s library contained a total of 125,941 titles, of which 56,830 (or 45.12%) were classified as domestic in origin.

¹²⁹ Per the statistics cited above in note 128, the library holds 19,890 volumes on constitutional law, 14,813 of which are of foreign origin. In the area of constitutional law, German volumes outnumber Korean volumes by a margin of 5647 to 5077.

justices have studied law overseas: three hold LL.M. degrees from the United States (two from the University of Michigan, one from Southern Methodist University), and one studied criminal law at the Max Planck Institute in Germany.¹³⁰ The members of the KCC have all traditionally been recruited from the career judiciary or the prosecutor's office; no law professor has ever been appointed to the KCC.

The level of foreign training possessed by the justices is likely to grow over time as a result of the Korean judiciary's expanding study-abroad program.¹³¹ At present, the Korean judiciary provides funding for roughly sixty judges to study overseas for one year at government expense.¹³² Judges who apply successfully for this program are awarded full tuition and a stipend that is slightly lower than their usual judicial salary.¹³³ Another forty or so judges are given a lower level of financial support to study abroad for a shorter period of six months as visiting scholars.¹³⁴ Judges are ordinarily eligible to apply for the study-abroad program from their seventh through tenth years of service. Given that there are roughly two hundred judges in any given cohort, the overall proportion of Korean judges who study abroad at some point approaches, if not exceeds, one-half.¹³⁵ Moreover, the Korean Supreme Court has recently announced a dramatic expansion of the program: all judges appointed after 2003 have now been promised the opportunity to study abroad, albeit as visiting scholars rather than degree candidates.¹³⁶

The official application for overseas study lists as possible destinations the United States, the United Kingdom, Canada, Germany, France, Switzerland, Japan, China, Spain, Russia, Australia, and Italy, but the list is not exclusive, and other countries may be requested "with enough evidence of necessity." Judges express their preferences for particular institutions from a list approved by the Korean Supreme Court, which allocates applicants among the various institutions. The judges themselves are then responsible

¹³⁰ See E-mail from Unnamed Official, Constitutional Court of the Republic of Korea, to author (Sept. 5, 2013, 20:57 EST) (on file with author); E-mail from Unnamed Official, Constitutional Court of the Republic of Korea, to author (Sept. 5, 2013, 19:39 EST) (on file with author).

¹³¹ The Korean Ministry of Justice operates a comparable program for prosecutors.

¹³² See Interview with Judge 1, *supra* note 122.

¹³³ See *id.*; REPUBLIC OF KOREA JUDICIARY, OFFICE OF COURT ADMIN., PERSONNEL ADMIN. AGENCY, 2013 NYEONDO HAEUEYEONSU ANNAE [2013 STUDY ABROAD GUIDE] 6-7 (on file with author).

¹³⁴ See Interview with Judge 1, *supra* note 122.

¹³⁵ There are roughly 200 judges in any given cohort, which means that approximately 800 judges are within the four-year eligibility window at any given time. Meanwhile, over the course of any given four-year period, roughly 400 judges will be selected for some form of overseas study.

¹³⁶ See Interview with Judge 1, *supra* note 122.

for gaining admission to the institutions to which they are assigned. As a practical matter, a major obstacle to a successful application is demonstration of the requisite language skills: some judges attend cram school on weekends in order to muster the necessary TOEFL score.

Notwithstanding the historical importance of German and Japanese law, roughly two-thirds of Korean judges opt for English-speaking jurisdictions, with a particular bias in favor of the United States. For the 2013–2014 academic year, out of a total of sixty-five judges receiving full funding for their overseas studies, forty-three selected English-speaking countries, of whom the overwhelming majority (thirty-five) chose the United States (thirteen as LL.M. students and twenty-two more as visiting scholars).¹³⁷ The United Kingdom has three, Canada and Australia each have two, and one opted for the Netherlands (which the Korean judiciary classifies as an English-speaking jurisdiction for purposes of study abroad).¹³⁸ By contrast, eight judges went to German-speaking countries (six to Germany itself, one to Austria, and one to Switzerland).¹³⁹ Only two chose Japan, which is now tied with China and is less popular than either France (five judges) or Spain (three judges).¹⁴⁰

Both the judicial preference for English-speaking countries, and the level of familiarity in Korea with American law more generally, are likely to grow in the future. A number of Korean judges attributed the preference for English-speaking countries to the heavy premium that Korean society places on the acquisition of English-language skills. Judges view time spent in the United States as an opportunity for their children to be exposed to the American educational system and to learn English. Law students in particular value English for the access that it gives them to the American legal market as well as elite Korean law firms, which have recruited large numbers of foreign-qualified lawyers.¹⁴¹ These trends are both reflected and reinforced by government regulation of Korean legal education. The law school accreditation committee established by the Korean ministry of education has adopted guidelines that call upon Korean law schools to offer

¹³⁷ See E-mail from Unnamed Official, Constitutional Court of the Republic of Korea, to author (Oct. 1, 2013, 19:28 EST) (on file with author).

¹³⁸ See *id.*

¹³⁹ See *id.*

¹⁴⁰ See *id.*

¹⁴¹ See Anthony Lin, *Made In USA*, ASIAN LAW., July 2013, at 16, 16–17 (citing statistics on the prevalence of foreign-qualified attorneys at top Korean law firms, and noting that the “vast majority of foreign lawyers at Korean firms are Korean Americans or Korean nationals who studied law in the United States”).

at least eight courses in foreign languages.¹⁴² Although some law schools offer courses in Japanese and Chinese, the majority of the foreign-language offerings are in English.¹⁴³

2. Constitutional Research Officers (CROs)

Compared to their counterparts elsewhere in East Asia or in the United States, the justices of the KCC enjoy access to higher levels of research assistance and foreign legal expertise. The KCC has at its disposal four types of support personnel who possess varying levels of foreign legal training and perform a combination of distinct and overlapping tasks: Constitutional Research Officers (CROs), Constitutional Researchers (CRs), Academic Advisers, and researchers at the KCC's Constitutional Research Institute.

Of these four types, the CROs are most analogous to law clerks of the American variety but are more numerous and more experienced. Most CROs are permanent employees who have passed the infamously demanding Korean bar examination¹⁴⁴ and are comparable in rank and pay to career judges. They are hired not by individual justices, but by the President of the KCC upon a collective vote of the justices.¹⁴⁵ Relatively demanding eligibility requirements are imposed by statute: a CRO must be a judge, prosecutor, or attorney; a legal academic of assistant professor rank or higher at an accredited university; a "Grade 4 or higher" public employee with five or more years of experience in "law-related positions in state agencies"; or a holder of a doctorate in law with five or more years of "law-related" experience in a state agency, university, or other research institute specified by KCC regulation.¹⁴⁶ Those who pass the selection process serve for renewable ten-year terms. A relatively inexperienced CRO may possess two to four years of experience; some possess over a decade of experience and have served longer than the justices themselves.

¹⁴² See E-mail from Yukyong Choe, Research Fellow, Judicial Policy Research Institute, Supreme Court of Korea, to author (Sept. 9, 2013 10:00:27 CST) (on file with author) (citing Ministry of Education, Science & Technology Directive 3.1.2.5).

¹⁴³ See *id.*

¹⁴⁴ Historically, the bar pass rate in Korea has rarely exceeded 5%. See Kyong-Whan Ahn, *Law Reform in Korea and the Agenda of "Graduate Law School,"* 24 WIS. INT'L L.J. 223, 227 (2007). Both the bar examination system and the bar pass rate are currently in flux due to profound reforms of Korean legal education, including the introduction of American-style graduate law schools that award J.D. degrees in lieu of undergraduate law programs. See Thomas Chih-hsiung Chen, *Legal Education Reform in Taiwan: Are Japan and Korea the Models?*, 62 J. LEGAL EDUC. 32, 34 (2012) (discussing legal education reforms in Korea).

¹⁴⁵ See CONSTITUTIONAL COURT OF KOREA, *supra* note 88, at 115-16.

¹⁴⁶ *Id.* (referencing the Constitutional Court Act as amended as of 1991).

The KCC also has at its disposal a number of temporary CROs. The Korean Supreme Court has a longstanding practice of dispatching judges to assist the KCC. Likewise, the Ministry of Justice regularly loans prosecutors to the KCC to serve as CROs. As of this writing, the KCC has over seventy CROs in total, including fifty-six regular CROs (five of whom are currently seconded to the Constitutional Research Institute), fourteen judges on loan from the Korean Supreme Court, four prosecutors on loan from the Ministry of Justice, and two temporary CROs on loan from miscellaneous government agencies (one from the Korean equivalent of the Internal Revenue Service and another from the Ministry of Government Legislation).

Under reforms initiated by the KCC's newly installed chief justice in 2013, a majority of the CROs are assigned to individual justices. Court administrators assign to each justice the equivalent of three and a half CROs.¹⁴⁷ Typically, each justice is assigned two regular CROs plus a career judge on loan from the Korean Supreme Court. In addition, each justice shares a CRO from the prosecutor's office with one other justice. With the exception of a handful who perform administrative or supervisory roles, the remaining CROs are divided by subject matter into three teams: liberty rights (meaning civil and political rights), economic and property rights, and social welfare rights (a category that includes pension and social security issues). The KCC's Constitutional Researchers and Academic Advisers, who possess extensive foreign legal expertise,¹⁴⁸ are also divided among the three subject-matter teams. The clerks assigned to individual justices handle routine cases, especially those that can be dismissed for jurisdictional or justiciability reasons. Difficult or controversial cases are referred to the subject-matter teams for group discussion.

Over half of the regular CROs have studied law overseas, and all are guaranteed the opportunity to do so at government expense after three or four years of service.¹⁴⁹ As of this writing, out of fifty-six regular CROs, twenty-five have studied in the United States as either LL.M. candidates or visiting scholars, while six have studied in Europe (specifically, Germany, France, and Spain). This geographical breakdown reflects a significant shift

¹⁴⁷ The justices do not have the ability to select their own CROs from the overall pool. Otherwise, explained one administrator, "there would be a big mess, even war" among the justices over the most capable CROs. E-mail from Unnamed Official, Constitutional Court of the Republic of Korea, to author (Aug. 29, 2013, 22:24 EST).

¹⁴⁸ See *infra* subsections III.D.3, III.D.4 (discussing the foreign training of the KCC's Constitutional Researchers and Academic Advisers).

¹⁴⁹ See Interview with Official B, *supra* note 121 (indicating that "literally everyone" who works as a CRO will eventually have studied law overseas).

in emphasis away from Germany toward the United States. A veteran administrator at the KCC reminisced that most of the initial cohort of CROs circa 1988 had studied law in Germany before joining the KCC and came of age at a time when German was widely taught in Korean high schools. By contrast, more recent CROs who arrive at the KCC with the intention of studying in Germany sometimes switch to the United States. The longer history of judicial review in the United States was cited as one factor. Other reasons for the shift toward the United States resemble those given by judges participating in the Korean Supreme Court's study-abroad program, including the opportunity for children to learn English.

Foreign legal study is not limited to enrollment at academic institutions. The KCC also stations CROs directly with foreign courts. Since 2011, the KCC has arranged for CROs to spend six months at the U.S. Supreme Court performing research on specific topics. To be selected for this program, a CRO must have previously studied in the United States as either a visiting scholar or LL.M. candidate. Likewise, the KCC has dispatched CROs to the German Constitutional Court to perform analogous research. Prior work experience can also be a source of foreign legal expertise, as in the case of one CRO who clerked at the South African Constitutional Court before joining the KCC.

Nor does the study of foreign law cease once CROs have returned home. In recent years, the CROs have organized study groups that translate prominent works of foreign legal scholarship into Korean. The resulting translations are distributed internally within the KCC.¹⁵⁰ Other study groups have focused on German and Spanish constitutional law. The KCC also regularly hosts international conferences that present additional opportunities for learning about foreign law. Both speakers at the court's first international symposium in 2012 hailed from Germany, while the December 2013 international symposium on the topic of welfare policy and constitutional adjudication featured prominent scholars from Germany, France, and the United States.

3. Constitutional Researchers (CRs)

As if the foreign legal expertise of the CROs were not enough, the KCC further bolsters its foreign legal research capabilities through the use of both

¹⁵⁰ In 2006, for example, the U.S. constitutional law study group collectively translated the second edition of Professor Chemerinsky's constitutional law treatise, ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (2d ed. 2002), and in 2009, it selected Professor Farber's treatise on the First Amendment, DANIEL A. FARBER, THE FIRST AMENDMENT (2d ed. 2002).

Constitutional Researchers (CRs) and Academic Advisers. The defining characteristic of CRs, as opposed to CROs, is that CRs are required to hold advanced degrees in foreign law and are hired specifically for their expertise in foreign law. Also unlike CROs, CRs are not permanent employees but instead work for the court under one-year contracts that are renewable up to a maximum of five years. As of this writing, a total of five CRs are divided among the three subject-matter teams.

CRs are asked to perform foreign legal research in one of two ways. First, the head of a team may ask a CR to write a memorandum on how a pending case would be decided in a foreign jurisdiction. Second, CRs routinely field requests from CROs for focused research on foreign law in connection with specific cases. However, there is nothing to prevent experienced or knowledgeable CROs from choosing to handle foreign legal research themselves rather than delegate it to a CR.

The educational backgrounds of the CRs reflect the emphasis attached to certain countries. As of this writing, one holds a doctorate in German law, another holds a doctorate in Japanese law, and three were trained in the United States (two J.D. holders and one S.J.D. holder). The two CRs assigned to the civil and political rights team are both U.S.-trained. The social rights team has one U.S.-trained CR and one German-trained CR, while the Japanese-trained CR is attached to the economic and property rights team. Because expertise on particular countries is unevenly allocated across teams, CRs routinely receive requests for help from other teams. CRs are also expected to provide coverage of additional countries according to their language skills. For example, U.S.-trained CRs have been asked to research British law, while the German-trained CR may be tasked with Austrian legal research.

Expertise on specific countries tends to be in greater demand for certain topics than for others. For example, civil and political rights cases were described by a CR as requiring more foreign legal research, “especially into U.S. law.” By contrast, U.S. law is viewed as less relevant to social welfare rights cases “because we know the U.S. Constitution doesn’t have social rights provisions.”¹⁵¹

4. Academic Advisers

The KCC also hires three professors in the fields of constitutional and administrative law as “Academic Advisers” on a contractual basis. One Academic Adviser is currently attached to each of the three subject-matter

¹⁵¹ Telephone Interview with Unnamed Official, *supra* note 127.

teams. Academic Advisers have part-time contracts and spend two days per week at the KCC participating in team discussion of pending cases and consulting with the justices and head CRO.

The standards of Korean legal academia ensure as a practical matter that the professors who are recruited by the KCC possess extensive comparative legal expertise. Constitutional law professors who lack foreign law degrees are a rare breed in Korea. Historically, it was difficult to find employment as a constitutional law professor in Korea without German legal training or language skills. Among younger generations of scholars, however, training in common law jurisdictions in lieu of Germany has become increasingly common, if not typical.

5. Experts Hired by the Parties

The KCC holds oral argument in only a small handful of highly important or controversial cases, on the order of one or two cases monthly.¹⁵² In these rare cases, both sides to the dispute tend to retain foreign law experts alongside regular counsel.¹⁵³ These experts—many of whom are former CROs in private practice or legal academia—submit written opinions then present their opinions at oral argument.¹⁵⁴

From time to time, court-appointed attorneys may also perform foreign law research, but the amount is likely to be limited. By statute, all litigants before the KCC must be represented by counsel,¹⁵⁵ and the KCC has the power to appoint state-funded attorneys not only for indigent parties, but also whenever it would be in the public interest to do so.¹⁵⁶ Roughly sixty attorneys per year are appointed from a list of eligible attorneys that includes former members of the KCC and former CROs as well as numerous individuals nominated by the Korean Bar Association.¹⁵⁷ Although these attorneys sometimes research foreign law, most are not foreign law experts,¹⁵⁸ and the extremely modest compensation that they receive—a flat rate of roughly \$700

¹⁵² See E-mail from Unnamed Official, Constitutional Court of the Republic of Korea, to author (Mar. 15, 2014, 08:00:09 EST) (on file with author).

¹⁵³ See *id.*

¹⁵⁴ See *id.*

¹⁵⁵ See CONSTITUTIONAL COURT OF KOREA, *supra* note 88, at 122 (citing the Constitutional Court Act).

¹⁵⁶ See *id.* at 123.

¹⁵⁷ See E-mail from Unnamed Official, *supra* note 152. In 2012, the KCC appointed a total of sixty-two lawyers. See *id.*

¹⁵⁸ See E-mail from Unnamed Official, Constitutional Court of the Republic of Korea, to author (Mar. 11, 2014, 03:32 CST) (on file with author).

per case—further limits the amount of foreign legal research that they can be expected to conduct.¹⁵⁹

6. The Constitutional Research Institute

In 2011, the Korean legislature authorized the creation of a Constitutional Research Institute (the *Hunbeob Jaepan Yongu Won*, or CRI) under the auspices of the KCC. The CRI is billed on its website as “a hub for research and education on constitution[s] and constitutional adjudication.”¹⁶⁰ The KCC announcement of the CRI’s creation hails South Korea for being “the first among some 80 countries having specialized and independent constitutional adjudication bodies to have created a research institution under the authority of a constitutional court.”¹⁶¹ The CRI was established during the tenure of former KCC Chief Justice Kang-Kook Lee, who desired that the KCC become the standard-bearer for constitutional adjudication in Asia and fashion a viable jurisprudential alternative to the traditionally dominant European and American models.¹⁶² The CRI would further these goals, it was argued, by equipping the KCC with the capacity to analyze, critique, and improve upon foreign approaches.

Led by the former dean of a prominent Korean law school, the CRI is housed in a separate building from the KCC and boasts a staff of approximately twenty-five researchers. Most of the CRI’s researchers are contract employees limited to a maximum term of five years, and CROs on loan from the KCC serve in supervisory roles. The researchers are divided into four teams: Comparative Constitutional Law, Legal Systems (or Legal Institutions), Basic Rights, and Instruction (or Education). With the exception of the Education Team—which is also the smallest of the four

¹⁵⁹ See E-mail from Unnamed Official, *supra* note 152.

¹⁶⁰ *Greetings*, CONST. CT. KOREA: CONST. RES. INST., <http://ri.ccourt.go.kr/eng> (follow “About CRI” hyperlink) (last visited Feb. 28, 2015), *archived at* <http://perma.cc/PU5N-K4YD>.

¹⁶¹ *Constitutional Research Institute Opens on Jan. 10*, CONST. CT. KOREA, (Jan. 10, 2011, 13:16:22), www.ccourt.go.kr/home/english/welcome/news_view.jsp?seq=106, *archived at* <http://perma.cc/8E3M-W2AF>. A senior KCC official acknowledged that the Peruvian Constitutional Court also possesses its own dedicated research institute, the *Centro de Estudios Constitucionales*, albeit one that is much smaller in scale. The Argentinian Supreme Court also possesses a research institute. See Graciela Rodríguez-Ferrand, *Argentina* (describing the creation of a Foreign Research and Reference Institute within the Argentinian Supreme Court Library), in *THE IMPACT OF FOREIGN LAW ON DOMESTIC JUDGMENTS* 4, 7 (The Law Library of Congress, Mar. 2010), *available at* <http://www.loc.gov/law/help/domestic-judgment/impact-of-foreign-law.pdf>.

¹⁶² See Telephone Interview with Unnamed Official, *supra* note 127. The KCC has openly proclaimed its goal of promoting throughout the world a “Korean system of constitutional justice” that “differs from the German or U.S. models.” *The 3rd Congress of the World Conference on Constitutional Justice Ends in Success*, CONST. CT. KOREA (Oct. 2, 2014), <http://english.ccourt.go.kr/cckhome/eng/introduction/news/newsDetail.do?bbsSeq=18>, *archived at* <http://perma.cc/864R-ZEVb>.

teams—the work of the CRI has thus far emphasized the study of foreign constitutional law in one form or another.¹⁶³ Its publications include annual reports on worldwide trends in constitutional adjudication and bimonthly e-mail newsletters that have touched on a wide range of countries from Algeria and Belgium to Peru and Serbia.¹⁶⁴

On occasion, the CRI does address explicitly domestic issues. For example, the Legal Systems team's responsibilities include the study of constitutional issues surrounding Korean reunification. Even this issue, however, has called for foreign legal research (on the topic of German reunification), and the majority of the research papers generated by the Legal Systems team have focused on various aspects of constitutional justice in other countries, such as the operation of the U.S. Supreme Court's *amicus curiae* system and France's transition from abstract to concrete judicial review in 2008.

CRI researchers are akin to the KCC's in-house CRs in several respects: they possess advanced degrees in foreign law, and their primary responsibility is foreign legal research. Three-quarters hold doctorates, while the remainder hold a J.D. or LL.M. from the United States. However, the two types of researchers perform complementary functions. Those at the KCC perform comparative research dictated by the adjudication-related demands of specific cases, whereas those at the CRI propose and pursue in-depth comparative research projects, free from the urgency of having to resolve pending cases. In other words, although researchers at both the KCC and CRI perform foreign legal research, those at the CRI do so proactively as opposed to reactively.

To expand its geographic coverage, the CRI also hires Korean-speaking "foreign correspondents" who reside in other countries and either possess legal training or work in the legal profession. Foreign correspondents are responsible for keeping the CRI apprised on a regular basis of constitutional adjudication in their respective countries. A recent vacancy announcement for positions in "Spanish-speaking countries," for example, provides that correspondents will be required to submit bimonthly reports, for which they will be paid approximately \$180 each.¹⁶⁵

¹⁶³ The remit of the Education Team is to educate prospective attorneys, government employees, and the general public on issues of constitutionalism and the rule of law.

¹⁶⁴ Telephone Interview with Unnamed Official, *supra* note 127.

¹⁶⁵ A copy of the vacancy announcement is on file with the author.

E. *Level of Interaction with Foreign Courts*

In stark contrast to the TCC, the KCC's level of engagement with foreign courts can only be described as extremely high. Its international outreach efforts are made possible by a combination of ambitious goals, considerable resources, and unhindered access to foreign audiences. The KCC boasts publicly of "transferring its experience and knowledge to a number of other countries, including Cambodia, Indonesia, Mongolia, Thailand, and Turkey."¹⁶⁶ The court's heavy commitment to foreign interaction is reflected by the existence of a full-time International Affairs Division with responsibility for organizing international conferences, receiving foreign delegations, and supporting overseas visits by members of the court.¹⁶⁷

The KCC has capitalized upon its involvement in international organizations to boost its influence and status in a number of ways. In 2006, South Korea became the first and only Asian member of the Venice Commission, the Council of Europe's advisory body on constitutional matters and the practical equivalent of an intergovernmental think tank for promoting constitutionalism and the rule of law.¹⁶⁸ A visit to Europe by the president of the KCC coincided with a desire on the part of the Commission to expand its membership and influence to Asia, and South Korea was soon thereafter invited to join the organization. Within the KCC, the invitation was widely construed as "evidence of global recognition" and acceptance of the KCC as the "epitome of Korean liberal democracy and rule of law."¹⁶⁹ Thus far, South Korea's representatives on the Commission have been drawn from the KCC,¹⁷⁰ and the KCC's own account of its first twenty

¹⁶⁶ *The 3rd Congress of the World Conference on Constitutional Justice Ends in Success*, *supra* note 162.

¹⁶⁷ See Interview with Unnamed Official, Constitutional Court of the Republic of Korea, in Seoul, Korea (Dec. 19, 2014) (indicating that staffing levels at the International Affairs Division doubled to roughly twenty people to cope with preparations for the World Conference of Constitutional Justice hosted by the KCC); *Organization*, CONST. CT. KOREA, <http://english.ccourt.go.kr/cckhome/eng/introduction/organization/organization.do> (last visited Feb. 28, 2015), *archived at* <http://perma.cc/5VL2-BYQD> (disclosing the existence of the "International Affairs Division" within the KCC's "Planning and Coordination Office").

¹⁶⁸ The Venice Commission is known formally as the European Commission for Democracy Through Law and was founded following the collapse of the Soviet Union, but its ambitions and operations now extend well beyond legal reform in the former Soviet bloc countries. See Paolo G. Carozza, *"My Friend Is a Stranger": The Death Penalty and the Global Ius Commune of Human Rights*, 81 TEX. L. REV. 1031, 1067 (2003) (summarizing the history and goals of the Venice Commission).

¹⁶⁹ See Telephone Interview with Unnamed Official, *supra* note 127.

¹⁷⁰ As of this writing, the South Korean delegate to the Venice Commission is Justice Il-Won Kang of the KCC. See *Members of the Venice Commission*, COUNCIL EUR.: VENICE COMMISSION, <http://www.venice.coe.int/WebForms/members/default.aspx> (last visited Feb. 28, 2015), *archived at* <http://perma.cc/839W-6ZWD>.

years brags of its responsibility as the “constitutional court of a country with a flourishing constitutional system” for “assisting newly democratizing countries” via the Venice Commission.¹⁷¹

The KCC is not content merely to participate in international judicial organizations, but instead aggressively pursues leadership opportunities. With the encouragement and financial support of the Venice Commission, the KCC established in 2010 the Association of Asian Constitutional Courts (AACC),¹⁷² a regional organization that mirrors the Commission’s objectives¹⁷³ and counts as its charter members the constitutional courts of Indonesia, Malaysia, Mongolia, the Philippines, Thailand, and Uzbekistan, in addition to the KCC itself. The KCC has made no secret of either its role in the AACC or its desire to enhance Korean influence and status through such initiatives. The AACC’s website praises the KCC’s “leading role” in launching the organization and characterizes the AACC’s first meeting as “a good opportunity for Korea to enhance its international status as chair country that led the AACC’s creation and also to promote to the world about [sic] its economic development and judicial advancement.”¹⁷⁴ Korean leadership, if not domination, of the AACC is further evidenced by the absence of Japan, Taiwan, and China. Although overtures were made to both the JSC and TCC, the AACC is viewed by the TCC as a thoroughly Korean undertaking, while various members of the JSC professed ignorance of the AACC’s existence. More recently—and once again with the endorsement of the Venice Commission—the KCC has also proposed the creation of an Asian Court of Human Rights, which it would play a leading role in organizing.¹⁷⁵

¹⁷¹ CONSTITUTIONAL COURT OF KOREA, *supra* note 88, at 143.

¹⁷² See *7th Conference of Asian Constitutional Court Judges Dealing With “Election Laws,”* KONRAD-ADENAUER-STIFTUNG: RULE L. PROGRAMME ASIA, <http://www.kas.de/rspa/en/events/41710> (last visited Feb. 28, 2015), *archived at* <http://perma.cc/4B4H-64SF> (noting the adoption of the Jakarta Declaration, which established the Association of Asian Constitutional Courts).

¹⁷³ For a formal statement of the AACC’s objectives, see *Statute, ASS’N ASIAN CONST. CTS. & EQUIVALENT INSTITUTIONS*, <http://www.aaccei.org/ccourt?act=statute>, *archived at* <http://perma.cc/FVN7-Y7XD>.

¹⁷⁴ See *The Constitutional Court of Korea to Host the AACC’s Inaugural Congress*, ASS’N ASIAN CONST. CTS. & EQUIVALENT INSTITUTIONS (May 16, 2012), <http://www.aaccei.org/ccourt?act=noticeView&bbsId=3100&bbsSeqn=245>, *archived at* <http://perma.cc/CW8D-AVCF>.

¹⁷⁵ See 3RD CONG. OF THE WORLD CONFERENCE ON CONSTITUTIONAL JUSTICE, SEOUL COMMUNIQUÉ (Sept. 30, 2014), *available at* http://www.venice.coe.int/wccj/seoul/WCCJ_Seoul_Communique-E.pdf (describing “the initiative of the Constitutional Court of the Republic of Korea to promote discussions on human rights co-operation, including the possibility of establishing an Asian human rights court”).

International conferences are another part of the KCC's strategy for achieving prominence in the judicial world. Membership in the Venice Commission contributed to the selection of South Korea to host the third congress of the World Conference on Constitutional Justice (WCCJ) in September of 2014.¹⁷⁶ The Commission acts as the secretariat for the WCCJ and reportedly favored an Asian venue after the first two meetings in Cape Town and Rio de Janeiro.¹⁷⁷ After broaching the possibility with the KCC, it chose South Korea over Indonesia to host the event.¹⁷⁸ The KCC seized upon this opportunity to promote itself and assert its leadership within the region. Its efforts to impress the foreign judges in attendance included a multimedia campaign featuring Olympic figure skater and beloved national icon Yuna Kim as the official Goodwill Ambassador of the Constitutional Court of Korea.¹⁷⁹ It also capitalized upon the high-profile forum of the WCCJ to unveil its proposal for an Asian Court of Human Rights.¹⁸⁰ As with the AACC, the congress was held without the participation of Japan, Taiwan, or China.

IV. THE TAIWANESE CONSTITUTIONAL COURT

A. *Level of Foreign Law Citation*

The published opinions of the TCC give the superficial appearance of a court that makes relatively little use of foreign law. Actual citation of foreign law is rare, especially in majority opinions. Of the 644 constitutional decisions rendered from January 1949 to June 2008, only four majority opinions (0.62%) cited foreign judicial precedent, and only eight (1.4%) cited a foreign constitution or statute.¹⁸¹ Concurring and dissenting opinions are more likely

¹⁷⁶ See *Overview*, 3RD CONGRESS WORLD CONF. ON CONST. JUST., <http://en.wccj2014.kr/eng/wccj3/overview.do> (last visited Feb. 28, 2015), archived at <http://perma.cc/FHY5-U56C> (describing the congress and its venue).

¹⁷⁷ E-mail from Unnamed Official, Constitutional Court of Korea, to author (Sept. 16, 2013, 20:32 EST).

¹⁷⁸ See *id.*

¹⁷⁹ See *Yuna Kim's Promotional Video for 3rd Congress of the World Conference on Constitutional Justice (WCCJ)*, ALL THAT YUNA (Sept. 18, 2014), <http://yunakimfan.com/2014/09/18/40786>, archived at <http://perma.cc/VE7Z-MNPT> (featuring English and Korean promotional videos in which Yuna Kim introduces herself as "Goodwill Ambassador for the Constitutional Court of Korea" and hails the conference for "bring[ing] together the top leaders of constitutional justice such as presidents of constitutional courts and chief justices of supreme courts from almost 100 countries around the world").

¹⁸⁰ See *supra* note 175 and accompanying text.

¹⁸¹ Law & Chang, *supra* note 11, at 557; see also Wen-Chen Chang & Jiunn-Rong Yeh, *Judges as Discursive Agent: The Use of Foreign Precedents by the Constitutional Court of Taiwan* (analyzing the

than majority opinions to mention foreign law: out of 554 separate opinions authored over the same period, 74 (13.4%) cited foreign precedent, while 121 (21.8%) cited foreign constitutions or statutes.¹⁸²

The lack of explicit citation of foreign law is attributable at least partly to the conventions of judicial opinion-writing in Taiwan. Traditionally, opinions for the court are concise and do not contain footnotes. As a result, any references to foreign law must take up limited space in the main text of the opinion, which renders them conspicuous and awkward. By contrast, separate opinions follow what one justice described as a “less rigid” form that allows for footnotes.¹⁸³ Consequently, separate opinions cite foreign law more frequently than majority opinions, and 80% of those citations appear in footnotes.

B. *Level of Foreign Law Usage*

The TCC’s published opinions barely hint at the full extent to which the court investigates foreign law. For a majority of the justices, comparative constitutional analysis is a virtually automatic practice. Multiple justices indicated that they “consult foreign constitutional materials” in “almost every case” or “ninety-plus percent” of the time.¹⁸⁴ The rare exceptions are cases in which foreign law is obviously unhelpful or irrelevant, such as a separation-of-powers dispute involving the Examination Yuan, one of the five branches of a convoluted governmental structure that is part of Sun-Yat Sen’s intellectual legacy and unique to the Republic of China’s Constitution.¹⁸⁵

TCC’s use of foreign precedent through 2010), in *THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES*, *supra* note 11, at 373, 381-86.

¹⁸² Law & Chang, *supra* note 11, at 557.

¹⁸³ Interview with Justice B, Current or Former Member of the Constitutional Court of the Republic of China, in Taipei, Taiwan (Nov. 19, 2010).

¹⁸⁴ Interview with Justice A, Current or Former Member of the Constitutional Court of the Republic of China, in Taipei, Taiwan (Nov. 12, 2010); Interview with Justice B, *supra* note 183; *see also, e.g.*, Interview with Justice K, Current or Former Member of the Constitutional Court of the Republic of China, in Taipei, Taiwan (Jan. 3, 2011) (deeming it “really obvious that German-trained justices will investigate German law maybe eighty to ninety percent of the time”); Interview with Clerk 2, Law Clerk to a Justice of the Constitutional Court of the Republic of China, in Taipei, Taiwan (Nov. 17, 2010) (observing that foreign legal research occurs in “almost every case”). *But see* Interview with Justice I, Current or Former Member of the Constitutional Court of the Republic of China, in Taipei, Taiwan (Dec. 27, 2010) (indicating that the frequency of foreign legal research is “definitely not ninety-plus percent of the time”).

¹⁸⁵ *See* MINGUO XIANFA ZENGXIU TIAOWEN art. 6 (2000) (Taiwan) (setting forth the powers and composition of the Examination Yuan). Notwithstanding its defeat in mainland China at the hands of the Communists, the Republic of China continues to control Taiwan and a number of smaller neighboring islands. *See* Law & Chang, *supra* note 11, at 540-43 (summarizing the history of the Republic of China, and describing the competing claims to sovereignty over Taiwan).

Even the justices who are relatively infrequent users of foreign law by the standards of the TCC still use it frequently in absolute terms. The most conservative estimate of foreign law usage was given by a law clerk who indicated that the justice for whom he works, a career judge, consults foreign law in one or two out of every six cases. It was widely (but not universally) agreed that justices appointed from the career judiciary tend to be more skeptical of the value and relevance of foreign law than those from academic backgrounds.¹⁸⁶ The justices who were not themselves former academics tended to be more circumspect about the extent to which they consult foreign law, saying only that “it depends on the case,”¹⁸⁷ or that they engage in comparative research “only if we think there is relevant foreign law to guide us.”¹⁸⁸

When hired, law clerks are often told that their “primary responsibility” will be comparative legal research.¹⁸⁹ For the small minority of cases that are decided on the merits, comparative legal research is “the most basic thing” that the clerks do and is required “probably 100% of the time.”¹⁹⁰ Various clerks also reported that analysis of the TCC’s own precedent typically comprises only a “very small portion” of the reports that they prepare for the justices on each case; the “vast majority” of the typical report is foreign legal research.¹⁹¹ Indeed, foreign constitutional law is taken so seriously that the Taiwanese judiciary itself publishes and sells hard-bound Chinese translations of case law from constitutional courts that are considered most influential in Taiwan—namely, the U.S. Supreme Court, the German *Bundesverfassungsgericht* and, most recently, the ECtHR, but no longer the JSC.¹⁹²

¹⁸⁶ Compare, e.g., Interview with Justice C, Current or Former Member of the Constitutional Court of the Republic of China, in Taipei, Taiwan (Nov. 26, 2010), Interview with Clerk 6, Law Clerk to a Justice of the Constitutional Court of the Republic of China, in Taipei, Taiwan (Nov. 25, 2010), Interview with Clerk 8, Law Clerk to a Justice of the Constitutional Court of the Republic of China, in Taipei, Taiwan (Nov. 26, 2010), and Interview with Clerk 9, Law Clerk to a Justice of the Constitutional Court of the Republic of China, in Taipei, Taiwan (Dec. 27, 2010) (all indicating that career judges are less inclined to use foreign law), with Interview with Justice B, *supra* note 183, and Interview with Clerk 3, Law Clerk to a Justice of the Constitutional Court of the Republic of China, in Taipei, Taiwan (Nov. 22, 2010) (arguing that career judges are no less inclined to use foreign law).

¹⁸⁷ Interview with Justice G, Current or Former Member of the Constitutional Court of the Republic of China, in Taipei, Taiwan (Dec. 27, 2010).

¹⁸⁸ Interview with Justice I, *supra* note 184.

¹⁸⁹ Interview with Clerk 1, Law Clerk to a Justice of the Constitutional Court of the Republic of China, in Taipei, Taiwan (Nov. 17, 2010); Interview with Clerk 2, *supra* note 184.

¹⁹⁰ Interview with Clerk 3, *supra* note 186.

¹⁹¹ Interview with Clerk 1, *supra* note 189; Interview with Clerk 2, *supra* note 184.

¹⁹² Sources inside the TCC attribute the Judicial Yuan’s recent discontinuation of the translation of JSC decisions to a “lack of resources,” Interview with Justice B, *supra* note 183, combined

All agreed that consulting foreign constitutional materials is simply not controversial, and that there is no meaningful correlation between a justice's "politics" in a "liberal" versus "conservative" sense and his or her willingness to consider foreign law. As one clerk observed, "Conservatives use foreign law too. They all use it."¹⁹³

C. Jurisdictions Considered

The major objects of comparative study for the TCC are Germany, the United States, Austria, and Japan. However, interest in Japanese constitutional law is in sharp and conspicuous decline, as evidenced by the Taiwanese judiciary's decision to stop publishing translations of JSC decisions. Much as in Korea, officials attributed the turn away from Japanese jurisprudence to the JSC's overwhelming conservatism in the area of constitutional law and consequent failure to produce noteworthy constitutional jurisprudence.¹⁹⁴ By contrast, consideration of ECtHR and Korean jurisprudence remains rare but is on the rise. From time to time, the TCC's clerks survey countries in the English-speaking world other than the United States. Historically, the TCC enjoyed a close relationship with the South African judiciary in particular: South Africa under apartheid was one of the few nations that extended diplomatic recognition to Taiwan and hosted Taiwanese judges on an official basis.¹⁹⁵ Those ties, however, have lapsed, and neither the South African Constitutional Court nor any other common law court apart from

with the fact that the influence of the JSC on Taiwanese constitutional law "is obviously declining, severely," Interview with Clerk 2, *supra* note 184. This decline was attributed, in turn, to a variety of mutually reinforcing factors. One is the growing willingness and greater ability on the part of the justices to "cut out the middleman" and look directly to U.S. and German law, from which Japanese constitutional jurisprudence borrows heavily. Interview with Justice B, *supra* note 183. Another is the fact that few of the current justices or clerks have Japanese legal training, which both reflects and accelerates the decline of Japanese influence. Third is a growing sense that the JSC is simply too conservative and too willing to uphold government action for its decisions to be of continuing interest or use to the TCC. On the increasingly rare occasions that a justice attempts to argue in favor of the (invariably conservative) Japanese approach, other justices are said to object that Japan is "not really an open, free country," that there is consequently "no need to look at what they're saying," Interview with Clerk 5, Law Clerk to a Justice of the Constitutional Court of the Republic of China, in Taipei, Taiwan (Nov. 22, 2010), and that Taiwan ought to look to "more advanced or progressive countries." Interview with Clerk 6, *supra* note 186; *accord* Interview with Clerk 8, *supra* note 186; Interview with Clerk 4, Law Clerk to a Justice of the Constitutional Court of the Republic of China, in Taipei, Taiwan (Nov. 22, 2010). Yet another cause, related to the immediately preceding one, is that Japanese legal scholarship has become a substitute for Japanese case law because, compared to the case law, the scholarship is more "solid," "fully developed," and "critical" and thus of greater use to the TCC. Interview with Clerk 4, *supra*.

¹⁹³ Interview with Clerk 5, *supra* note 192.

¹⁹⁴ See *supra* note 192.

¹⁹⁵ See Law & Chang, *supra* note 11, at 548.

the U.S. Supreme Court was described by any of the justices or clerks interviewed as a regular source of inspiration.

There is a strong relationship between the educational backgrounds of the justices and the sources of foreign law that they prefer to cite. Justices with German law degrees account for 87% of citations to German precedent and 60% of citations to German constitutional or statutory provisions.¹⁹⁶ Likewise, justices with some form of American legal training were responsible for 61.7% of citations to American precedent.¹⁹⁷ Moreover, the period during which citations to the U.S. Supreme Court outnumbered citations to the German *Bundesverfassungsgericht* (1985 to 1994) coincided with the period during which justices educated in the United States outnumbered justices educated in Germany.¹⁹⁸ These correlations are not difficult to explain: in Taiwan as elsewhere,¹⁹⁹ judges are more likely to use what they know than what they do not know.

D. *Level of Foreign Law Expertise*

The TCC is highly knowledgeable about how courts elsewhere have approached similar issues. If the justices fail to cite or adopt another court's approach to a particular question, they do so out of choice, not out of ignorance. "If it's been covered elsewhere," assured one clerk, "they have considered it. They might not follow [the foreign approach], but they'll consider it."²⁰⁰ One justice put it bluntly: "We are already fully knowledgeable about foreign law. The problem is translating this knowledge into our social and political context."²⁰¹

For the most part, the justices and their clerks acquire their extensive knowledge of foreign law in traditional ways: they study it in school, they conduct research, and they talk to their colleagues. As of this writing, eleven of the fifteen justices hold either an LL.M. or Ph.D. in law from another country; three have studied law in more than one foreign country. Seven

¹⁹⁶ See *id.* at 558.

¹⁹⁷ See *id.*

¹⁹⁸ See Chang & Yeh, *supra* note 181, at 383, 384 tbl.1 (describing the educational background and foreign citation habits of the justices during the TCC's fifth term).

¹⁹⁹ See, e.g., Gérard V. La Forest, *The Use of American Precedents in Canadian Courts*, 46 ME. L. REV. 211, 213 (1994) (noting a "definite link" between the use of American precedent by Canadian Supreme Court justices and the training of those justices in the United States); L'Heureux-Dubé, *supra* note 9, at 20 ("Judges, lawyers, and academics who go abroad for parts of their education . . . naturally turn for inspiration and comparison to those jurisdictions whose ideas are [already] familiar to them.")

²⁰⁰ Interview with Clerk 2, *supra* note 184.

²⁰¹ Interview with Justice F, Current or Former Justice, Constitutional Court of the Republic of China, in Taipei, Taiwan (Dec. 27, 2010).

have studied in Germany, four in the United States, two in Japan, and one in mainland China. The fact that a majority of the justices are former law professors contributes to the high level of foreign legal training.²⁰² In Taiwan—and indeed in most of East Asia, but not the United States—it is common for constitutional law professors to possess a law degree from overseas.²⁰³

The TCC does not have nearly the same range of resources for conducting foreign legal research as the KCC, but Taiwan's justices make the most of what they have. Each justice is allotted only one law clerk, and there are no shared clerks. The clerks do not serve fixed terms, but most serve for longer than just one year.²⁰⁴ Many clerks are either concurrently enrolled in domestic Ph.D. programs or preparing to apply for Ph.D. programs overseas. It is up to each justice how to select his or her clerk, but an LL.M. is a de facto hiring requirement, and many of the clerks receive part or all of their graduate-level legal training overseas. In addition, some justices prefer to hire clerks with strength in a particular language, typically either English or German, that will be helpful for research purposes.²⁰⁵ The clerks, in turn, rely heavily upon one another, thanks in part to the fact that they complement each other with different language skills and foreign legal expertise. Research on foreign law is now conducted “mostly” on the Internet and through online research services such as Westlaw and its German equivalent, Beck Online.²⁰⁶

²⁰² By statute, law professors constitute one of the five categories of persons eligible for appointment to the TCC, and no single category is supposed to comprise more than one-third of the court's members. See *Ssu Fa Yuan Tsu Chih Fa* [Organic Act of the Judicial Yuan], art. 4, para. 1, 37 XIANXING FAGUI HUIBIAN 25399, 25400 (1957) (Taiwan). In practice, “flexible interpretation” of the categories, combined with the fact that many candidates fall under multiple categories, has meant that a majority of the justices are former academics. Law & Chang, *supra* note 11, at 545-46 & 545 n.93. The TCC is not unusual among specialized constitutional courts in having designated seats for legal academics. See Saunders, *supra* note 11, at 578 (noting that the “mode of appointment” to specialized constitutional courts “often includes a proportion of scholars with an interest and some expertise in comparative law”).

²⁰³ See *infra* Table 1 (summarizing the extent to which constitutional law professors at elite law schools in Japan, South Korea, Taiwan, Hong Kong, and the United States possess foreign legal training).

²⁰⁴ For example, one justice had four different clerks over the course of seven years, which is a fairly typical level of turnover.

²⁰⁵ Of the justices who make a point of hiring clerks with particular linguistic aptitudes, some seek out clerks who can compensate for their own weakness in a particular language, while others prefer clerks who share the same linguistic strengths as they do, in order to help them research the law of countries that they already tend to consult most frequently.

²⁰⁶ The TCC has librarians who do not help with substantive foreign legal research but will acquire foreign law books upon request. See Interview with Clerk 2, *supra* note 184.

The litigants themselves are of limited use in helping the justices to learn about relevant foreign law. Most petitioners are *pro se*,²⁰⁷ and the few lawyers who do appear tend to be inexperienced at making constitutional arguments of any kind, much less comparative ones.²⁰⁸ However, if the justices feel that they need more information on a particular topic, they may convene an unofficial information-gathering session (*shuo ming hui*) at which academics will discuss the topic and explain relevant foreign jurisprudence.²⁰⁹ These sessions serve as a functional substitute for both oral argument (which occurs only in “extreme cases”)²¹⁰ and *amicus curiae* briefing (which is not “against the rules” but “not the habit” either)²¹¹ but double as a mechanism for learning about foreign law. Perhaps twice a year, the TCC will also invite foreign scholars, most frequently from Germany, to conduct informational seminars with the justices.²¹²

E. *Level of Interaction with Foreign Courts*

The TCC’s opportunities for engagement with foreign courts are severely constrained. In a globalized world, the TCC is a rarity: it has been cut off from regular interaction with other courts. The TCC has become a “natural experiment in judicial isolation”²¹³ due to mainland China’s largely successful efforts to isolate Taiwan from the international community.

The dwindling handful of countries with which Taiwan still enjoys diplomatic relations²¹⁴ are the few remaining places in the world where the

²⁰⁷ See Interview with Justice B, *supra* note 183.

²⁰⁸ See *id.* (characterizing the briefs filed by attorneys with the TCC as weak); Interview with Clerk 1, *supra* note 189 (describing the quality of briefs filed with the TCC as “poor” and reflective of a lack of experience with constitutional litigation, but noting that test cases are occasionally brought on a pro bono basis by Lee & Li, a large law firm with superior resources); Interview with Clerk 2, *supra* note 184 (concurring in Clerk 1’s assessment); Interview with Chien-Feng Wei, Attorney, in Taipei, Taiwan (Nov. 24, 2010) (estimating that no more than five or six attorneys in all of Taiwan regularly litigate constitutional cases, and indicating that he personally brings one or two cases before the TCC per year); Interview with Nigel Li, Partner, Lee & Li, in Taipei, Taiwan (Nov. 24, 2010) (concurring that very few attorneys in Taiwan regularly litigate constitutional cases, and indicating that he personally handles roughly ten to twelve cases per year that result in petitions to the TCC).

²⁰⁹ See Interview with Justice B, *supra* note 183; see also Saunders, *supra* note 11, at 579 (noting the TCC’s practice of holding “expert meetings in which scholars give their views on aspects of comparative constitutional experience”).

²¹⁰ Interview with Justice B, *supra* note 183.

²¹¹ *Id.*

²¹² Interview with Admin. Official, Constitutional Court of the Republic of China, in Taipei, Taiwan (Nov. 25, 2010).

²¹³ See Law & Chang, *supra* note 11, at 527, 538.

²¹⁴ Taiwan has official diplomatic ties with only twenty-three countries. See *id.* at 540 n.66.

Justices of the Constitutional Court can expect a red-carpet welcome. South Africa under apartheid was one such country; visiting members of the TCC attended a party in their honor with members of the South African Constitutional Court and were even treated to a tour of the country.²¹⁵ Today, the members of the TCC can still look forward to a warm welcome if they visit Panama or Burkina Faso. But such hospitality is disappearing in tandem with Taiwan's diplomatic relations.

Membership in international organizations also poses challenges for the TCC and its justices. A case in point is the Korean-instigated formation of the AACC, discussed above in Section III.E. A member of the KCC invited the TCC to apply for membership, but after some internal discussion, the TCC decided not to apply, partly for fear of the potential "embarrassment" that might result if China were subsequently asked to participate.²¹⁶ A number of justices expressed concern that if the TCC were to join first (under its proper name, the "Constitutional Court of the Republic of China") and then China were to join subsequently, China might insist that the TCC be forced to participate under a different name or ejected from the organization entirely—a possibility that they wished to avoid.²¹⁷

Participation in international conferences can be equally problematic. The website for the second congress of the WCCJ held in 2011 in Rio de Janeiro, for example, boasted the sponsorship of the Venice Commission and the participation of no less than eighty-eight constitutional courts and ten regional court associations.²¹⁸ Yet no one from the TCC was invited.²¹⁹ Nor were the Taiwanese welcome when their Korean neighbors hosted an

²¹⁵ See *id.* at 548; Interview with Justice E, Current or Former Member of the Constitutional Court of the Republic of China, in Taipei, Taiwan (Dec. 3, 2010); Interview with Justice D, Current or Former Member of the Constitutional Court of the Republic of China, in Taipei, Taiwan (Nov. 26, 2010).

²¹⁶ See Interview with Justice A, Current or Former Member of the Constitutional Court of the Republic of China, in Taipei, Taiwan (Dec. 18, 2010); Interview with Justice I, *supra* note 184; Interview with Judicial Admin., in Taipei, Taiwan (Nov. 25, 2010). The justices were also aware that Japan had already decided not to join, although its reasons for declining were not known.

²¹⁷ To date, neither Taiwan nor China has joined the association.

²¹⁸ See 2ND CONGRESS OF THE WORLD CONFERENCE ON CONSTITUTIONAL JUSTICE, LIST OF PARTICIPANTS (2011), available at http://www.venice.coe.int/WCCJ/Rio/WCCJ_List_of_Participants.pdf (listing the representatives of the eighty-eight constitutional courts and ten regional court associations that participated in the January 2011 meeting hosted in Rio de Janeiro by the Federal Supreme Court of Brazil and sponsored by the Venice Commission).

²¹⁹ See E-mail from Justice A, Current or Former Justice of the Constitutional Court of the Republic of China, to author (Feb. 27, 2011, 09:31 PST) (on file with author); E-mail from Justice H, Current or Former Justice of the Constitutional Court of the Republic of China, to author (Mar. 1, 2011, 04:16 PST) (on file with author).

even larger number of courts at the third congress in 2014.²²⁰ In some cases, Taiwanese judges have literally been turned away at the border, as occurred in 1983 when the International Association of Judges met in Egypt²²¹ and again in 2004 at the biennial meeting of the International Association of Women Judges held in Uganda.²²²

Efforts by members of the TCC to visit constitutional courts in other countries have also been frustrated by Chinese interference. The justices ordinarily receive a travel budget that enables them to visit foreign courts for research purposes; the choice of destination is left to them, and in a typical year, a group of three or four justices will make use of the summer recess to visit a constitutional court that they find of particular interest or relevance to their work.²²³ Some countries, such as Australia,²²⁴ Germany,²²⁵ Hungary,²²⁶ and South Korea,²²⁷ were identified as relatively hospitable and trouble-free destinations, at least for a fortunate few justices. Other countries, however, have resorted to face-saving avoidance techniques. The justices may be told, for example, that a visit to France's *Conseil constitutionnel* requires approval by the Ministry of Foreign Affairs,²²⁸ or that the officials needed to authorize passage through France happen to be on vacation.²²⁹ Similar episodes have occurred in Italy and Spain.²³⁰

Nor are countries with close historical or political ties to Taiwan necessarily more receptive to Taiwanese visitors. Notwithstanding Japan's primary responsibility for shaping Taiwan's current legal system over five decades of colonial rule, Japanese judges and officials were described as "generally unwilling to meet" with Taiwanese visitors and more concerned with the state of their relations with China than with their former colony.²³¹ The fact that some Taiwanese judges have studied in Japan and are personally

²²⁰ See *supra* notes 176-80 and accompanying text (noting both the magnitude of the event and the exclusion of the TCC).

²²¹ Interview with Justice E, *supra* note 215.

²²² According to a justice who attempted to attend the conference, the Taiwanese judges were denied entry visas by Uganda because China had offered to fund construction of a new building for the judiciary and had made clear its desire that the Taiwanese delegation be barred from attending. Interview with Justice I, *supra* note 184.

²²³ Interview with Justice B, *supra* note 183; Interview with Clerk 2, *supra* note 184.

²²⁴ Interview with Justice I, *supra* note 184; Interview with Judicial Admin., *supra* note 216.

²²⁵ Interview with Justice C, *supra* note 186.

²²⁶ Interview with Justice B, *supra* note 183.

²²⁷ Interview with Clerk 2, *supra* note 184 (describing an official reception held at the South Korean Constitutional Court for visitors from the TCC).

²²⁸ See Interview with Judicial Admin., *supra* note 216.

²²⁹ See Law & Chang, *supra* note 11, at 556; Interview with Justice C, *supra* note 186.

²³⁰ See Law & Chang, *supra* note 11, at 556-57.

²³¹ See Interview with Judicial Admin., *supra* note 216.

acquainted with Japanese judges means that judge-to-judge contact remains possible, at least on an unofficial, individual basis.²³² However, if official visitors from the TCC are received at the Japanese Supreme Court at all, it is generally by administrative officials or, at best, retired justices.²³³

As difficult as it can be for Taiwan's judges to attend international meetings or visit courts in other countries, playing the part of host can pose even greater challenges. Inviting distinguished judges from other countries to Taiwan is, in the words of one TCC justice, "very hard."²³⁴ The President of the German *Bundesverfassungsgericht*, for example, indicated with regret that it would be "difficult" for political reasons to accept an invitation from the TCC,²³⁵ and a number of justices reported that their success in inviting German constitutional jurists had been limited to retirees.²³⁶ On this count, the members of the United States Supreme Court have proved braver: Justices O'Connor, Kennedy, and Scalia have all visited the TCC.²³⁷ Even when dealing with the U.S. Supreme Court, however, Taiwan's justices are wary of extending official invitations for fear that they are likely to be rebuffed.²³⁸

The TCC's ties to the outside world are bolstered to some extent by the fact that the former law professors on the court possess their own international network of academic connections, but the use of these contacts does not always bear fruit.²³⁹ The effectiveness of academic backchannels is limited, moreover, by Chinese efforts to thwart the participation of Taiwanese law professors in foreign conferences and private scholarly organizations, as exemplified by the expulsion of Taiwan's national association of constitutional law professors from the International Association of Constitutional Law in 1999.²⁴⁰

Finally, even when there are no political barriers to Taiwanese participation, a small country such as Taiwan is inherently easy for the organizers of international gatherings to overlook or ignore. A case in point is Yale Law School's oft-noted global constitutionalism seminar, now entering its third

²³² See *id.*

²³³ See Interview with Clerk 8, *supra* note 186; Interview with Clerk 2, *supra* note 184.

²³⁴ Interview with Justice B, *supra* note 183.

²³⁵ Interview with Clerk 3, *supra* note 186.

²³⁶ See, e.g., Interview with Justice J, Current or Former Member of the Constitutional Court of the Republic of China, in Taipei, Taiwan (Dec. 30, 2010); Interview with Judicial Admin., *supra* note 216.

²³⁷ See Interview with Justice B, *supra* note 183.

²³⁸ See *id.* (offering by way of example the use of a Harvard professor as a go-between in an ultimately unsuccessful effort to bring Justice Souter to Taipei).

²³⁹ See Law & Chang, *supra* note 11, at 556 (describing unsuccessful overtures made through academic channels to arrange meetings with members of the Italian and Spanish Constitutional Courts).

²⁴⁰ See *id.* at 550-52.

decade, which brings together constitutional judges from around the world on an invitation-only basis for closed-door discussions.²⁴¹ On only one occasion—in 1997—has a member of the TCC participated, and sources on the TCC could identify only one other justice who has ever been invited.

V. THE HONG KONG COURT OF FINAL APPEAL

A. *Level of Foreign Law Citation*

Citations to foreign law are a staple of HKCFA opinions. Indeed, the court cites foreign law more often than it cites domestic law. In cases involving constitutional rights, fully three-quarters of its case citations are to foreign and international courts,²⁴² while one-third of its legislative citations are to foreign legislation.²⁴³

B. *Level of Foreign Law Usage*

As its citations demonstrate, the HKCFA routinely gives serious consideration to foreign law. Once discovered, relevant foreign case law is unlikely to be ignored without explanation or acknowledgment. If the HKCFA were to learn of a Canadian appellate decision on point, for example, the justices would consider themselves entirely free to take a different approach but would also feel a “need to explain why.”²⁴⁴ Moreover, any usage of foreign law is likely to be explicitly disclosed.

The differences between common law and civil law courts help to explain why the HKCFA is more transparent in its usage of foreign law than the JSC, KCC, or TCC. First, like other common law courts, the HKCFA issues opinions that are heavily laden with citations and thus offer an inherently more complete picture of the authorities considered.²⁴⁵ Second, the values of the adversarial system weigh in favor of disclosing foreign law usage. In the words of one justice, “fundamental fairness” requires that the parties have an opportunity to respond to any foreign cases

²⁴¹ See, e.g., SLAUGHTER, *supra* note 12, at 98 (citing the Yale Law School seminar as a forum for global judicial dialogue); Alford, *supra* note 19, at 669 (same); McCrudden, *supra* note 6, at 511 (same).

²⁴² Simon N.M. Young, *Constitutional Rights in Hong Kong's Court of Final Appeal*, 27 CHINESE (TAIWAN) Y.B. INT'L L. & AFF. 67, 82 tbl.10 (2011) (analyzing all of the HKCFA's constitutional decisions over the first ten years of the court's existence, from 1999 to 2009).

²⁴³ *Id.* at 82 tbl.11.

²⁴⁴ See Interview with Justice B, Permanent or Non-Permanent Justice of the H.K. Court of Final Appeal, in H.K. (June 6, 2014).

²⁴⁵ See *supra* notes 50-52 and accompanying text (contrasting the approaches of common law and civil law courts to the citation of case law).

that the court has in mind.²⁴⁶ Consequently, the HKCFA aims for “full disclosure” of all authorities considered as well as cited.²⁴⁷ Any foreign authorities that the court considers but ultimately does not cite are supposed to be included in the “list of authorities not cited” that accompanies each decision.²⁴⁸ This practice of full disclosure does not preclude “the odd footnote reference” to a previously undisclosed foreign decision for the purpose of reinforcing a point already established by other cases.²⁴⁹ If, however, the substance of the decision relies on a foreign case, the court will “ask the parties if they have anything to say” about it.²⁵⁰

A combination of legal and normative factors are highly conducive to judicial comparativism in Hong Kong. From a legal perspective, various provisions of Hong Kong’s Basic Law contemplate or require judicial comparativism of some form. Notwithstanding the fact that China is not a common law country, article 84 expressly authorizes Hong Kong courts to “refer to precedents of other common law jurisdictions,”²⁵¹ while article 8 provides that the “laws previously in force in Hong Kong,” including “the common law,” “shall be maintained.”²⁵² The Basic Law also obligates Hong Kong courts to apply international human rights law: article 39 constitutionally entrenches the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and “international labour conventions.”²⁵³ The content of the ICCPR is further incorporated into domestic law by the 1991 Hong Kong Bill of Rights Ordinance.²⁵⁴

At the same time, Hong Kong’s status as an autonomous “Special Administrative Region” of China blunts some of the normative criticisms commonly leveled elsewhere against comparativism. First, it makes little sense to object in the context of Hong Kong that judicial comparativism

²⁴⁶ Interview with Justice A, Permanent or Non-Permanent Justice of the H.K. Court of Final Appeal, in H.K. (June 6, 2014); *accord* Interview with Justice B, *supra* note 244.

²⁴⁷ Interview with Justice A, *supra* note 246; *accord* Interview with Justice B, *supra* note 244.

²⁴⁸ *See* Interview with Justice A, *supra* note 246; Interview with Justice B, *supra* note 244.

²⁴⁹ Interview with Justice A, *supra* note 246.

²⁵⁰ *Id.*

²⁵¹ XIANGGANG JIBEN FA art. 84 (H.K.).

²⁵² *Id.* art. 8.

²⁵³ *Id.* art. 39.

²⁵⁴ Hong Kong Bill of Rights Ordinance, (1997) Cap. 383; *see* Lam Siu Po v. Comm’r of Police, [2009] 12 H.K.C.F.A.R. 237, 250C-D (C.F.A.) (H.K.) (opinion of Bokhary, J.) (observing that the Bill of Rights Ordinance is “taken almost verbatim” from the ICCPR); GITTINGS, *supra* note 66, at 275 (noting that the Bill of Rights Ordinance is “almost a carbon copy of the rights listed in the ICCPR”).

compromises national sovereignty.²⁵⁵ The whole point of Hong Kong's unique constitutional scheme, which was built upon formal guarantees of autonomy negotiated between China and the United Kingdom, is to insulate Hong Kong from the full exercise of Chinese sovereignty.²⁵⁶ The authority of the Hong Kong judiciary to make continuing use of foreign and international law is an important ingredient of Hong Kong's precious autonomy. Thus, even assuming *arguendo* that judicial comparativism compromises national sovereignty, that may be cause for celebration rather than criticism in Hong Kong.

Second, Hong Kong's unusual circumstances also defeat the criticism that comparativism invites judicial activism by expanding the range of materials that can be used to justify the invalidation of laws.²⁵⁷ Such criticisms rest upon the premise that judicial activism is illicit because it entails lawmaking

²⁵⁵ See, e.g., H.R. Res. 568, 108th Cong. (2004) (asserting that "inappropriate judicial reliance on foreign judgments, laws, or pronouncements [sic] threatens the sovereignty of the United States"); ROBERT H. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* 16 (rev. & expanded ed. 2003) ("By creating international law [the cosmopolitan left] hopes not only to outflank American legislatures and courts but to have liberal views adopted at a different level and then imposed on the United States."); Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks*, 118 HARV. L. REV. 1255, 1303-10 (2005) (book review) (critically evaluating the use of foreign law in constitutional interpretation from the perspective of "democratic sovereignty," and arguing that "the invocation of foreign constitutional law . . . is fundamentally at odds with democratic constitutional self-government"); Mark Tushnet, *Transnational/Domestic Constitutional Law*, 37 LOY. L.A. L. REV. 239, 261-63 (2003) (noting that concerns about the impairment of sovereignty are a recurring theme of "criticisms of the use of non-U.S. law as a rule of decision," and arguing that such concerns are not valid).

²⁵⁶ See *supra* notes 64-65 and accompanying text (discussing the Sino-British Joint Declaration and its consequences for Hong Kong's Basic Law).

²⁵⁷ See, e.g., BORK, *supra* note 255, at 137-38 (deeming it "illegitimate" for courts to "seek guidance" from foreign courts then insist that "legislatures obey" their decisions, and criticizing comparativism as a form of judicial activism that turns judicial review into a "launching pad[]" for the preferred reforms of cosmopolitan liberals); Alford, *supra* note 19, at 680 ("One wonders whether a new Supreme Court nominee can openly embrace [comparativism] and not risk the dreaded label of a judicial activist."); Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L L. 69, 69 (2004) ("The most trenchant critique of [judicial] use of international materials is that it serves as mere cover for the expansion of selected rights favored by domestic advocacy groups . . .").

Whether comparativism actually leads to judicial activism in the form of more frequent invalidation of laws is questionable. See Alford, *supra* note 19, at 675-76 (demonstrating with examples that "[t]he Court frequently has relied on foreign authority" to uphold restrictions on individual liberties, and predicting that "the Court will continue to receive invitations to reference foreign experiences in order to uphold government restrictions on individual freedoms or curtail the expansion of rights"); Ramsey, *supra*, at 76 ("[T]here is nothing necessarily rights enhancing about international materials. In many areas, it seems likely that the United States is an outlier in *protecting* rights that few other societies recognize.").

by unelected judges at the expense of democratic lawmaking processes.²⁵⁸ In the context of Hong Kong, however, it is difficult to object to judicial invalidation of government action as undemocratic or countermajoritarian because Hong Kong's legislature and chief executive are not fully elected but instead chosen pursuant to a convoluted formula designed to ensure compliance with Beijing's wishes.²⁵⁹ The acts of pseudo-elected officials on behalf of an authoritarian regime do not exactly cry out for judicial deference in the name of democracy. Indeed, far from undermining democratic self-governance, vigorous judicial review might be said to operate as a partial substitute for democratic governance by keeping Hong Kong's government within the kinds of legal limits that are prevalent in democratic countries, and by giving the people of Hong Kong a reliable and transparent mechanism for challenging government actions that affect them.

C. Jurisdictions Considered

The HKCFA relies most frequently on case law from the United Kingdom. Roughly half of the case citations found in the HKCFA's constitutional rights jurisprudence are to British cases.²⁶⁰ Indeed, the HKCFA cites cases from the United Kingdom with much greater frequency than its own case law: whereas 48% of all citations are to case law from the United Kingdom, only 11% are to the HKCFA's own jurisprudence.²⁶¹ Other popular jurisdictions include Canada and the United States, which

²⁵⁸ See David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 727-30 (2009) (noting the preoccupation of American constitutional theory with the extent to which the supposedly "counter-majoritarian" character of judicial review necessitates judicial restraint, and reviewing empirical scholarship that casts doubt on the extent to which judicial review is actually countermajoritarian).

²⁵⁹ See Albert H.Y. Chen, *International Human Rights Law and Domestic Constitutional Law: Internationalisation of Constitutional Law in Hong Kong*, 4 NAT'L TAIWAN U. L. REV. 237, 273 (2009) (observing that the existence of a "democracy deficit" in Hong Kong makes it impossible to object to judicial use of international law on democratic grounds); *supra* notes 64-67 and accompanying text (describing how the chief executive and half of the members of the legislature are selected in ways that favor constituencies sympathetic to China and give Beijing an effective veto over the selection of candidates).

²⁶⁰ Young, *supra* note 242, at 82 tbl.10.

²⁶¹ *Id.*; see also Andrew Byrnes, *A Framework for the Comparative Analysis of Bills of Rights* ("The courts of Hong Kong manifest an excessive reliance on, and deference to, English decisions at almost every level; they tend to follow, almost automatically, developments in England and have considerably less time for developments elsewhere in the common law world."), in *PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES* 318, 355 (Philip Alston ed., 1999).

together account for 9% of case citations,²⁶² and Australia and New Zealand, which collectively lay claim to 7%. Especially in the case of American case law, however, the fact that cases are cited does not necessarily mean that they are followed.²⁶³

Although it receives fewer citations than the British courts, the ECtHR may be more influential than the raw citation numbers would suggest. International courts and tribunals such as the ECtHR account for only 8% of the HKCFA's case citations,²⁶⁴ but scholars and judges alike have observed that the jurisprudence of the ECtHR tends to receive serious consideration from Hong Kong courts.²⁶⁵

D. *Level of Foreign Law Expertise*

Legal and normative factors of the type mentioned in Section V.B help to explain why the HKCFA might be especially willing to use foreign and international law. They do not, however, directly explain the court's high level of foreign law expertise or ability to perform foreign legal research. A variety of institutional factors contribute to the HKCFA's heavy capacity for comparativism as well as its taste for British law in particular. These factors include: (1) the entrenchment of the legal system inherited from the United Kingdom; (2) the direct participation of overseas judges and lawyers in the work of the HKCFA; (3) the extent to which local judges and lawyers are educated in the United Kingdom; and (4) the potential for assistance

²⁶² Young, *supra* note 242, at 82 tbl.10; see also Johannes M.M. Chan, *Hong Kong's Bill of Rights: Its Reception of and Contribution to International and Comparative Jurisprudence*, 47 INT'L & COMP. L.Q. 306, 309-10 (1998) (noting that, in interpreting Hong Kong's Bill of Rights Ordinance, Hong Kong courts have made "few references to comparative jurisprudence from jurisdictions other than Canada or the United States," with the exceptions of the European Court of Human Rights and the British Privy Council).

²⁶³ See Chan, *supra* note 262, at 310 (observing that the relatively few citations to cases from the United States tend to be made "with reservations"); Young, *supra* note 242, at 82 (noting that constitutional cases from Canada and the United States are "often considered" but "not always followed"); cf. Byrnes, *supra* note 261, at 368-69 (reporting that Hong Kong courts "have felt particularly comfortable in dealing with decisions under the Canadian Charter" of Rights and Freedoms when asked to interpret the Hong Kong Bill of Rights, and that Canadian judicial decisions tend to be both more accessible and more familiar to Hong Kong counsel than American decisions).

²⁶⁴ Young, *supra* note 242, at 82 tbl.10.

²⁶⁵ See Chan, *supra* note 262, at 309 (reporting that Hong Kong courts make "extensive reference" to ECtHR case law when interpreting the Bill of Rights Ordinance); Young, *supra* note 242, at 82 (describing the ECtHR as "[p]robably the most influential source" of foreign case law); Interview with Justice A, Permanent or Non-Permanent Justice of the H.K. Court of Final Appeal, in H.K. (May 4, 2014) (opining that Hong Kong courts may be more willing to cite ECtHR jurisprudence than the jurisprudence of most foreign courts); Interview with Judge 1, Current or Former Judge of the High Court of H.K., in H.K. (May 4, 2014) (same).

with foreign legal research through the relatively new system of judicial assistants.

1. The Entrenched Legacy of British Rule

An understanding of the HKCFA's heavy expertise in foreign law, and British law in particular, requires at least some background knowledge of Hong Kong's history and relationship with mainland China. From the mid-1800s until China's resumption of sovereignty in 1997, Hong Kong was a British colony,²⁶⁶ and the Privy Council in London served accordingly as its highest court.²⁶⁷ The establishment of the HKCFA in 1997 to replace the Privy Council as Hong Kong's highest court was ordained by the Basic Law,²⁶⁸ which is technically a statute enacted by the National People's Congress of the People's Republic of China (PRC) but functions as a constitution for the semi-autonomous Hong Kong Special Administrative Region (HKSAR).²⁶⁹ Both the existence and the content of the Basic Law reflect the terms of the Sino-British Joint Declaration, the treaty under which the United Kingdom returned sovereignty over Hong Kong to China in exchange for guarantees that Hong Kong would continue to enjoy a high degree of autonomy in its internal affairs.²⁷⁰

Several provisions of the Basic Law guarantee the continuity of Britain's legal legacy in Hong Kong notwithstanding the resumption of Chinese sovereignty. As previously noted, article 8 preserves "[t]he laws previously in force in Hong Kong" under British colonial rule—namely, "the common law, rules of equity, ordinances, subordinate legislation and customary law,"²⁷¹ while article 87 expressly obligates courts in Hong Kong to apply that preexisting body of law.²⁷² Because Hong Kong is now part of China, judicial application of the "laws previously in force in Hong Kong" and "the common law" involves the application of what is now technically foreign law.

Judging from the frequency of citation to British law as well as the accounts given by judges themselves, the Hong Kong judiciary has

²⁶⁶ See GITTINGS, *supra* note 66, at 10. While the southern portion of Hong Kong was originally ceded by China to Britain in perpetuity, the northern portion was instead leased for ninety-nine years. See *id.*

²⁶⁷ See *id.* at 5.

²⁶⁸ XIANGGANG JIBEN FA art. 81 (H.K.).

²⁶⁹ See GITTINGS, *supra* note 66, at 46-50 (explaining why, notwithstanding objections from mainland Chinese officials and scholars, the Basic Law "fits the definition of a constitution" and is consequently "commonly referred to in Hong Kong" as a "mini-constitution").

²⁷⁰ See *supra* note 64 and accompanying text.

²⁷¹ XIANGGANG JIBEN FA art. 8 (H.K.).

²⁷² *Id.* art. 87.

succeeded at maintaining the continuity of the legal system.²⁷³ It is a mark of this continuity that Hong Kong judges—most of whom received their legal training in the United Kingdom—do not necessarily conceptualize British law as foreign. When asked why Hong Kong courts make such heavy use of foreign law, one justice responded that he did not think of English or Australian cases as foreign law but rather as simply “the common law,” a system of principles and reasoning that transcends national boundaries and encompasses Hong Kong.²⁷⁴ It is necessary to consider English and Australian cases, he explained, because one determines “whether one is right” by “comparing conclusions reached by other judges applying the same system of law in similar cases.”²⁷⁵

2. Participation of Overseas Judges and Lawyers

Articles 82 and 84 of the Basic Law explicitly authorize the recruitment of judges “from other common law jurisdictions,”²⁷⁶ while article 94 does the same for the legal profession by allowing the licensing of “lawyers from outside Hong Kong to work and practise in the Region.”²⁷⁷ The ostensible rationale for allowing foreign judges to serve on the HKCFA was not to increase the court’s aptitude for comparativism, but rather to compensate for the lack of experience with final appellate courts among Hong Kong judges.²⁷⁸ Whatever the reason for their inclusion, however, one would be hard-pressed to imagine a more efficient and effective way to ensure foreign legal expertise on a court than to appoint foreign judges.

The HKCFA hears appeals in five-judge panels²⁷⁹ but has historically had only four permanent members, including the Chief Justice.²⁸⁰ By statute, the fifth justice is selected by the Chief Justice from a roster of local

²⁷³ One member of the HKCFA recalled the experience of conducting a trial that spanned the days immediately before and after the British handover of Hong Kong to China. He noticed only one change between June 30, 1997 (the last day of British rule), and July 1, 1997 (the first day of Chinese rule): the royal coat of arms in the courtroom had been replaced by the red bauhinia seal of the Hong Kong Special Administrative Region.

²⁷⁴ Interview with Justice B, *supra* note 244.

²⁷⁵ *Id.*

²⁷⁶ XIANGGANG JIBEN FA art. 82 (H.K.). Within the judiciary, only the Chief Justice of the HKCFA and the Chief Judge of the High Court must be Chinese citizens. *Id.* art. 90.

²⁷⁷ *Id.* art. 94.

²⁷⁸ See GITTINGS, *supra* note 66, at 189.

²⁷⁹ Hong Kong Court of Final Appeal Ordinance, (1997) Cap. 484, 5, § 16 (H.K.). Applications for leave to appeal are decided by three-judge panels. *Id.* § 18.

²⁸⁰ By statute, the minimum number of permanent justices (including the Chief Justice) is four, but nothing in the statute appears to preclude the appointment of more than four permanent justices. *Id.* § 5(1),(5). In practice, the HKCFA has not had more than four permanent justices at a time.

and foreign non-permanent judges.²⁸¹ The list of local non-permanent judges consists primarily of retired members of the HKCFA itself, while the list of foreign judges is drawn exclusively “from other common law jurisdictions.”²⁸² It is unnecessary for the foreign judges to possess prior exposure to Hong Kong law; indeed, anyone who possesses prior experience as a lower court judge in Hong Kong is ineligible for appointment as a foreign judge.²⁸³

In practice, the Chief Justice ordinarily chooses a visiting foreign judge to occupy the last seat.²⁸⁴ The majority of these foreign judges have hailed from the United Kingdom, with Australia and New Zealand providing the remainder.²⁸⁵ In all forty-five of the constitutional cases decided by the HKCFA through 2009, the permanent judges of the court were joined by a former or sitting member of the British House of Lords, the Privy Council, or the Australian High Court.²⁸⁶ Thus far, no Canadians or South Africans have served as visiting judges on the HKCFA.²⁸⁷ One factor that contributes to the heavy representation of British judges is the United Kingdom’s longstanding practice of allowing its best active-duty judges to

²⁸¹ *Id.* §§ 9, 16. Like the permanent justices, the local and foreign “non-permanent” justices are appointed by Hong Kong’s Chief Executive on the recommendation of a judicial nominating commission. Whereas permanent justices serve until retirement age (at which point they may be renewed for a limited period of time), non-permanent justices face no retirement age and serve exclusively for fixed, renewable terms. *Id.* §§ 7–9.

²⁸² *Id.* §§ 5(3), 9.

²⁸³ *See id.* at 4, § 12(4) (deeming ineligible for appointment as a “judge from another common law jurisdiction” anyone who has ever been “a judge of the High Court, a District Judge or a permanent magistrate, in Hong Kong”).

²⁸⁴ *See* Young, *supra* note 242, at 81 (reporting that all 45 constitutional cases decided by the HKCFA through 2009 included the participation of a former or sitting member of the Australian High Court, the British House of Lords, or the Privy Council); Simon N.M. Young & Antonio Da Roza, *Judges and Judging in the Court of Final Appeal: A Statistical Picture*, H.K. LAWYER, Aug. 2010, at 1, 3, available at <http://hub.hku.hk/bitstream/10722/129553/1/HKLawyer-JudgesJudging-Aug2010.pdf> (reporting that an overseas judge participated in 97% of all cases heard by the HKCFA from its creation in 1997 through 2010).

²⁸⁵ *See* Young, *supra* note 242, at 79, 80 tbl.9 (listing the overseas judges who participated in the HKCFA’s constitutional cases over the first ten years of the court’s existence, and noting that they all hailed from the United Kingdom, Australia, and New Zealand). At present, the list of non-permanent justices consists of six retired Hong Kong judges, four retired Australian judges, one retired judge from New Zealand, and seven active and retired judges from the United Kingdom. *See List of Judges and Judicial Officers (Position as at 23 February 2015)*, H.K. JUDICIARY, <http://www.judiciary.gov.hk/en/organization/judges.htm> (last visited Feb. 28, 2015), archived at <http://perma.cc/UKB4-7BV4>.

²⁸⁶ *See* Young, *supra* note 242, at 81.

²⁸⁷ *See supra* note 285 (discussing the nationalities of the HKCFA’s past and present non-permanent justices).

serve concurrently on overseas courts.²⁸⁸ An extreme example is Lord Neuberger, who currently serves as a non-permanent justice of the HKCFA as well as the chief justice of the United Kingdom Supreme Court.²⁸⁹ In practice, however, the availability of active British judges is constrained by their domestic duties.²⁹⁰

The tendency of parties to hire prominent foreign counsel in high-stakes constitutional cases further exposes the HKCFA to foreign law. By their own account, the justices “rely heavily on counsel” to bring relevant foreign precedent to their attention.²⁹¹ Because the most sought-after human rights lawyers to appear before the HKCFA tend to hail from the United Kingdom, the HKCFA can be assured of learning about British law at a minimum.²⁹²

3. The Foreign Education of Lawyers and Judges

Until the 1970s, Hong Kong lacked either law schools of its own or a supply of locally trained lawyers.²⁹³ Consequently, most of the lawyers in Hong Kong with sufficient experience to be plausible candidates for appointment to senior positions in the judiciary—including all of the permanent justices of the HKCFA—have studied law in the United Kingdom. Although the passage of time may eventually bring about a predominance of locally trained judges at the most senior levels, this has not yet come to pass.

The fact that all of the permanent members of the HKCFA (and all but one of its non-permanent members) received their legal education outside

²⁸⁸ See Interview with Johannes Chan, Dean, Univ. of H.K. Faculty of Law, in Taipei, Taiwan (June 10, 2014) (identifying the United Kingdom’s historical tradition of dispatching personnel to assist its colonies and dominions as a reason for its willingness to share active judges with the HKCFA).

²⁸⁹ See Interview with Justice A, *supra* note 246; *List of Judges and Judicial Officers (Position as at 23 February 2015)*, *supra* note 285 (listing both the permanent and non-permanent members of the HKCFA).

²⁹⁰ See Interview with Justice A, *supra* note 246 (noting that the HKCFA does not recess in August because that is the only time when the U.K. Supreme Court’s schedule permits Lord Neuberger to hear cases in Hong Kong).

²⁹¹ See Interview with Justice A, *supra* note 265.

²⁹² See Interview with Justice A, *supra* note 246 (citing Baron Pannick, QC and Michael Fordham, QC as examples).

²⁹³ See *id.* (noting that Hong Kong lacked any local law graduates prior to 1973); see also *About Us*, FACULTY OF LAW, U. H.K., <http://www.law.hku.hk/faculty/index.php> (last visited Feb. 28, 2015), archived at <http://perma.cc/5JU9-2QDL> (indicating that the University of Hong Kong, home to Hong Kong’s first law school, lacked any kind of law department until 1969 and lacked an autonomous law school until 1978).

Hong Kong²⁹⁴ has helped to ensure a high level of sophistication about foreign law. Even a gradual transition to locally trained judges, however, seems unlikely to significantly diminish the prevalence of foreign legal expertise on the bench given the heavily international character of Hong Kong law schools. For example, the members of the University of Hong Kong Faculty of Law—the oldest of the three local law schools—hail from seventeen different countries, and less than half are ethnically Chinese (a category that includes professors from mainland China and Taiwan as well as Hong Kong).²⁹⁵

4. Research Assistance

Because both the justices themselves and the lawyers who appear before them tend to be well versed in foreign law, the HKCFA is not reliant on its clerks for foreign legal expertise. Nevertheless, the clerks—known as judicial assistants—do provide additional support for the comparative enterprise.

The use of law clerks is a relatively new phenomenon in Hong Kong. The HKCFA hired its first judicial assistants roughly a decade ago, and their responsibilities are still evolving.²⁹⁶ As of this writing, the number of judicial assistants is expanding from five to eight.²⁹⁷ Judicial assistants serve one-year terms²⁹⁸ and do not work exclusively for individual justices or even the HKCFA. Instead, they rotate between the HKCFA and the appellate division of the High Court and spend perhaps half of their time at the HKCFA performing legal research.²⁹⁹

Unless instructed otherwise, a judicial assistant is likely to approach a research assignment by investigating both British and Hong Kong law. If the relevant law in those jurisdictions is unclear or conflicting, additional

²⁹⁴ The exception is Justice Patrick Chan, who studied law at the University of Hong Kong and served as a permanent justice of the HKCFA until 2013, at which time he became a non-permanent member of the court. See *Patrick Chan (Judge)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Patrick_Chan_\(judge\)](http://en.wikipedia.org/wiki/Patrick_Chan_(judge)) (last visited Feb. 28, 2015), archived at <http://perma.cc/35H9-7SVN>.

²⁹⁵ See Interview with Johannes Chan, *supra* note 288 (estimating that no more than thirty-five to forty percent of the law school's faculty are ethnically Chinese).

²⁹⁶ See Interview with Justice A, *supra* note 265; Interview with Judicial Assistant 1, Judicial Assistant to the H.K. Court of Final Appeal and the High Court of H.K., in H.K. (June 6, 2014).

²⁹⁷ See Interview with Justice A, *supra* note 246 (noting the planned expansion of the number of judicial assistants to eight); Interview with Judicial Assistant 1, *supra* note 296.

²⁹⁸ See Interview with Justice A, *supra* note 265; Interview with Judicial Assistant 2, Judicial Assistant to the H.K. Court of Final Appeal and the High Court of H.K., in H.K. (June 6, 2014).

²⁹⁹ See Interview with Justice A, *supra* note 246; Interview with Judicial Assistant 1, *supra* note 296 (indicating that “about half the job is legal research”); Interview with Judicial Assistant 2, *supra* note 298 (describing a system of three-month rotations between the High Court and the HKCFA).

jurisdictions such as Australia or Canada may also be considered.³⁰⁰ Of the current crop of five, three have foreign law degrees (two from England and one from Australia). However, the committee of judges responsible for hiring the judicial assistants does not place a premium on foreign legal expertise, and the proportion of assistants with foreign training varies considerably from year to year.

E. *Level of Interaction with Foreign Courts*

When it comes to interaction with foreign judges, the Hong Kong judiciary is a model of transparency and recordkeeping. Its annual report, available in both English and Chinese from its website, lists in chronological order every foreign visitor to the judiciary, ranging from a “14-member delegation of the Judicial Research and Training Institute of the Republic of Korea” to a “10-member delegation led by Mr Sherali Rahmanov, Deputy Chairperson of the Supreme Court of the Republic of Uzbekistan.”³⁰¹ Likewise, the report lists visits by members of the Hong Kong judiciary to destinations and institutions outside Hong Kong.³⁰² Several judges indicated that the report’s listing of interaction with foreign jurists can be trusted as comprehensive.³⁰³

The HKCFA’s overall level of interaction with foreign courts and judges can fairly be described as high. Although the report does not always distinguish between visits to the judiciary as a whole and visits to the HKCFA in particular, it is clear that one or more members of the HKCFA have at least monthly in-person interaction with some combination of

³⁰⁰ See Interview with Judicial Assistant 1, *supra* note 296; E-mail from Judicial Assistant 2, Judicial Assistant to the H.K. Court of Final Appeal and the High Court of H.K., to author (June 10, 2014, 13:01 EST) (on file with author).

³⁰¹ See *Hong Kong Judiciary Annual Report 2013: Highlights of Events in 2013*, H.K. JUDICIARY, http://www.judiciary.gov.hk/en/publications/annu_rept_2013/eng/highlights.html (last updated Feb. 26, 2014), *archived at* <http://perma.cc/DHS4-7X7F>. The report also includes aggregate statistics for the number of discrete visits and visitors in three separate categories, “Local,” “The Mainland,” and “Overseas,” but these overall figures distinguish neither between visitors to the judiciary as a whole and visitors to the HKCFA, nor between judicial and non-judicial visitors. See *Hong Kong Judiciary Annual Report 2013: Number of Visits and Visitors to the Judiciary*, H.K. JUDICIARY, http://www.judiciary.gov.hk/en/publications/annu_rept_2013/eng/visitors.html (last updated Feb. 26, 2014), *archived at* <http://perma.cc/UA9V-YXGQ>.

³⁰² Inspection of the report reveals, for example, that on May 23, 2013, Chief Justice Ma delivered a talk entitled “Courage and the Law: Upholding the Dignity of the Individual” at the University of Zurich, while on the following day, a magistrate judge named Lin Kam-hung attended a maritime law seminar in Shenzhen. See *Hong Kong Judiciary Annual Report 2013: Highlights of Events in 2013*, *supra* note 301.

³⁰³ See Interview with Justice A, *supra* note 246; Interview with Justice B, *supra* note 244; Interview with Judge 1, Current or Former Judge of the High Court of H.K., in H.K. (June 6, 2014).

foreign or mainland Chinese jurists, above and beyond what is entailed by the inclusion of a foreign judge on every panel. Hong Kong is also part of what has been described as an “informal circuit of judges” among Commonwealth countries and has become—alongside England, Australia, and New Zealand—a primary exporter of judges, “particularly to smaller jurisdictions in the Caribbean and Pacific regions.”³⁰⁴

VI. CONVENTIONAL EXPLANATIONS FOR COMPARATIVISM

Explanations for judicial comparativism can be divided into what might be called “demand-side” and “supply-side” explanations. Demand-side explanations focus on the preferences that judges have with respect to comparativism (or, put differently, their demand for foreign legal expertise). Supply-side explanations focus on the extent to which judges possess the resources and capabilities needed to engage in comparativism (or, in other words, the supply of foreign legal expertise available to judges). To fully understand the occurrence of comparativism, it is necessary to investigate both the supply and demand sides of the equation. Judges will not engage in comparativism, or any other practice, unless they possess both the inclination and the ability to do so. Moreover, supply and demand cannot be discussed independently of one another because they are interdependent. Over time, demand increases supply by incentivizing investment in the necessary institutional infrastructure, while supply increases demand by lowering the cost to judges of engaging in comparativism.

Most discussion of comparativism tends to dwell on the demand side of the equation, to the neglect of the supply side. There is little agreement, however, over what motivates judges to seek out foreign law. The most conventional explanation for judicial comparativism, in the sense of being the explanation typically offered by judges themselves, casts judicial motivations in a flattering light: judges practice comparativism because they believe that it enriches their knowledge and thus the quality of their decisionmaking.³⁰⁵ The explanation advanced by opponents of comparativism

³⁰⁴ Simon N.M. Young, *The Hong Kong Multinational Judge in Criminal Appeals* (noting also that “Canadian and American judges do not appear to be involved” in this international flow of judges), in *CRIMINAL APPEALS 1907-2007: ISSUES AND PERSPECTIVES* 130, 132 (Chris Corns & Gregor Urbas eds., 2008).

³⁰⁵ See, e.g., Bryde, *supra* note 11, at 296; *Justice Ginsburg Interview*, *supra* note 11, at 819; Kirby, *supra* note 19, at 186; La Forest, *supra* note 199, at 218, 220 (“[L]ittle pockets of particular expertise develop in foreign courts . . . [T]he use of foreign material affords another source, another tool for the construction of better judgments . . . [F]rom time to time a look outward may reveal refreshing perspectives.”); L’Heureux-Dubé, *supra* note 9, at 26-27; Anthony Mason, *The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human Rights in Hong Kong*,

posits a less noble set of judicial preferences: judges resort to foreign law, critics argue, for the purpose of justifying ideologically desired results that lack sufficient support in domestic law.³⁰⁶

Although empirical research suggests that there is at least an element of truth to the less charitable view,³⁰⁷ scholars have identified a much broader range of reasons why courts may develop a taste for comparativism.³⁰⁸ The level of judicial interest in foreign law could, for example, be a function of the adequacy of domestic jurisprudence. A court faced with a relatively sparse body of domestic jurisprudence might use foreign law to perform a gap-filling function. This might be the case for a relatively new court, a court confronted with regime change (such as democratization) that fundamentally alters its own role and calls for reexamination of its existing jurisprudence, or a court faced with a relatively new constitution.³⁰⁹ This

37 H.K. L.J. 299, 302 (2007) ("In many instances, relevant choices have been made, sometimes differing choices, by courts of other jurisdictions. Apart from these choices, the reasoning behind the choice may provide useful assistance."); Rehnquist, *supra* note 14, at 412 ("[N]ow that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process."); Breyer, *supra* note 14. See generally Law, *supra* note 47, at 147 (summarizing, with examples, "the justifications given by most judges, most of the time, for engaging in comparativism").

³⁰⁶ See, e.g., BORK, *supra* note 255, at 137-38 (denouncing comparativism as a means by which cosmopolitan liberals advance their preferred reforms); Black et al., *supra* note 24, at 21, 43 (hypothesizing, and finding empirical evidence, that the members of the U.S. Supreme Court "cite transnational sources of law to prop up the logic of their opinions" and "create the illusion that [they are] acting with considerable supporting precedent" when reaching ideologically motivated decisions or overruling precedent); Ramsey, *supra* note 257, at 69 (cautioning that judicial comparativism can "serve[] as mere cover for the expansion of selected rights favored by domestic advocacy groups").

³⁰⁷ See Black et al., *supra* note 24, at 35 (finding as an empirical matter that U.S. Supreme Court justices are more likely to cite "transnational law" when reaching decisions that they favor on ideological grounds, striking down statutes, or overruling precedent); Erik Voeten, *Borrowing and Nonborrowing Among International Courts*, 39 J. LEGAL STUD. 547, 567, 572 (2010) (finding that separate opinions by ECtHR judges that cite external legal sources "almost always argue in favor of a more expansive" interpretation of rights, and concluding that "the use of external decisions is driven in part by the individual ideologies of judges").

³⁰⁸ See, e.g., HIRSCHL, *supra* note 11, at 21-22 (listing "globalization and increased inter-connectivity," "instrumentalism," "the importance of professional networks that judges operate in," and "structural features" among the various explanations offered by scholars for the phenomenon of "global constitutional dialogue," and emphasizing the role of "sociopolitical context" in shaping "whether and where the judicial mind travels in its search for pertinent foreign sources"); McCrudden, *supra* note 6, at 516-27 (identifying ten factors that might promote judicial comparativism including, inter alia, the type of political regime in which the foreign court is situated, and the sympathy of the audience toward foreign law references).

³⁰⁹ See, e.g., BOBEK, *supra* note 11, at 14, 42-43 (noting that "[n]ewly established or transforming legal systems frequently use comparative reasoning as a source of inspiration and external authority," and that such use may decline once "a system starts believing in its own self-sufficiency"); Chen, *supra* note 259, at 272 ("Without an indigenous tradition of constitutional protection of human rights, it

period of jurisprudential scarcity is likely to coincide, moreover, with a period of political and institutional flux that raises an abundance of unusually important or contentious constitutional questions,³¹⁰ which may only increase the court's need for authority of some kind to justify and legitimate its decisions.³¹¹

From a theoretical perspective, it is unclear whether courts in mature legal systems will necessarily make less use of foreign law. There are at least three distinct possibilities that point in different directions. The first possibility might be called the *substitution hypothesis*: to the extent that foreign law fills a void left by a lack of homegrown jurisprudence that coincides with a period of heightened need for legal authority, judicial comparativism might be expected to decline over time as domestic law offers an increasingly adequate substitute for foreign law.³¹² A second

[has been] natural for Hong Kong to draw on external resources for support and guidance.”); Gianluca Gentili, *Canada: Protecting Rights in a 'Worldwide Rights Culture': An Empirical Study of the Use of Foreign Precedents by the Supreme Court of Canada (1982–2010)* (finding empirically that, following Canada's adoption of a new constitution in 1982, the Canadian Supreme Court's “citation of foreign law declined between the end of the 1990s and the end of the 2000s,” and attributing this decline to the development of “sufficient domestic jurisprudence” and consequent reduction in reliance on “foreign sources”), in *THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES*, *supra* note 11, at 39, 54; Tom Ginsburg, *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan*, 27 L. & SOC. INQUIRY 763, 790 (2002) (“[L]egislatures in new democracies are typically underdeveloped and unable to carry out what might otherwise be their natural function of norm replacement. One would thus expect courts in democratic transitions to play a special role of looking abroad to transform their constitutional orders.”); Mason, *supra* note 305, at 302 (noting the “natural attraction” of comparative law for a “newly-established court which has not yet developed its own corpus of jurisprudence”); McCrudden, *supra* note 6, at 523–24; Saunders, *supra* note 11, at 574, 582 (noting that “[f]oreign law may lose its authority . . . as local jurisprudence develops,” and citing Germany, South Africa, and Hungary as examples of countries where judicial use of foreign jurisprudence has declined “as the local jurisprudence becomes established”).

³¹⁰ See, e.g., GINSBURG, *supra* note 63, at 30, 106–246 (observing that, “in the context of new democracies and political transitions,” “by definition the institutional structure of the political system is in a period of transition,” and chronicling the landmark constitutional cases faced by courts in Taiwan, Mongolia, and Korea in the aftermath of democratization); Shannon Ishiyama Smithey, *A Tool, Not a Master: The Use of Foreign Case Law in Canada and South Africa*, 34 COMP. POL. STUD. 1188, 1193–94 (2001) (observing that, in the aftermath of major constitutional change, both the Canadian Supreme Court and South African Constitutional Court were faced with many “highly contentious” and “literally ‘unprecedented’” situations).

³¹¹ Cf. Smithey, *supra* note 310, at 1192, 1204, 1207 (hypothesizing that judges search more broadly for support for their opinions in the face of opposition, and finding consistent with this hypothesis that the Canadian Supreme Court and South African Constitutional Court were more likely in their early years to cite foreign law in cases involving novel or “particularly contentious questions,” such as those decided by a fractured court or involving the overturning of government action).

³¹² See BOBEK, *supra* note 11, at 14–15 (noting a decline in judicial use of foreign law in Germany and central European post-communist countries after an “initial boom of comparative inspiration,” and suggesting that the decline may be attributable to a growing sense of “self-

possibility might be called the *habituation hypothesis*: comparativism is habit-forming and becomes increasingly well accepted and difficult to dislodge over time. Yet another possibility might be called the *circumvention hypothesis*: judges engage in comparativism precisely because there is domestic law on point that they wish to avoid or circumvent. When precedent stands in the way of a court's objectives, the court must turn elsewhere for support, and the use of foreign law may help the court to overcome the obstacle posed by domestic law.³¹³

Use of foreign law can also be a way for a court to elevate its status and promote acceptance of its decisions among domestic audiences by identifying itself with high-prestige courts and countries.³¹⁴ The practice of looking to a handful of prestigious and influential countries for guidance may be perceived not as a form of illicit judicial activism, but rather as a constraint upon judicial discretion and thus a source of legitimacy.³¹⁵ Courts that need to consolidate

sufficiency"); *id.* at 43 n.12 (identifying Germany and South Africa as countries in which judicial references to foreign sources diminished as domestic law accumulated); Smithey, *supra* note 310, at 1199-1200, 1206 (finding in both Canada and South Africa a "small but significant" negative relationship between the number of constitutional cases previously decided and the degree of foreign law citation in subsequent constitutional cases, but also reporting that this relationship failed to reach statistical significance in the case of Canada once additional variables were introduced into the analysis).

³¹³ See, e.g., Black et al., *supra* note 24, at 35 (reporting that the Supreme Court becomes more likely to cite "transnational law" when it is overruling precedent or striking down laws).

³¹⁴ See, e.g., WOJCIECH SADURSKI, CONSTITUTIONALISM AND THE ENLARGEMENT OF EUROPE 23 (2012) (observing that "being aligned with a prestigious and powerful European tribunal, endowed with a high degree of legitimacy derived from states' international obligations, is extremely welcome in conflict-prone and democratically weak domestic contexts," and noting for example that the Hungarian Constitutional Court's practice of citing ECtHR case law may advance both its domestic legitimacy and foreign reputation); Black et al., *supra* note 24, at 39 (finding empirically that the "transnational law" citation habits of U.S. Supreme Court justices favor "those countries most likely to be deemed legitimate by the American public and by elites"—namely, stable, democratic, wealthy, English-speaking countries); Kalb, *supra* note 11, at 440 (arguing that use of foreign jurisprudence "may allow for a borrowing of their perceived legitimacy by a court lacking in its own"); Law & Chang, *supra* note 11, at 570 (observing the awareness of the TCC that "following in the footsteps of powerful and prestigious countries" helps Taiwan to "generate badly needed support and acceptance among the international community"); Saunders, *supra* note 11, at 580 (suggesting that a new constitutional court may make use of foreign jurisprudence to "augment [its] authority" and "establish its place in the constitutional order"); cf. Gregory A. Caldeira, *The Transmission of Legal Precedent: A Study of State Supreme Courts*, 79 AM. POL. SCI. REV. 178, 189-91 (1985) (finding that within the United States, prestige differentials among state supreme courts are a significant predictor of "intercourt communication," measured in terms of the degree to which one state supreme court cites another).

³¹⁵ See, e.g., Kalb, *supra* note 11, at 439-41 (arguing that strategic judicial citation of foreign law in transitional democracies can have the effect of legitimating courts and bolstering judicial independence); Sydney Kentridge, *Comparative Law in Constitutional Adjudication: The South African Experience* (suggesting that use of comparative jurisprudence helps to ensure that judges do not simply make a constitution "mean whatever [they] want it to mean"), in JUDICIAL RECOURSE TO FOREIGN LAW: A

their authority have the most to gain from making strategic use of foreign law in this manner. Therefore, all other things equal, relatively new courts and courts in new or transitional democracies might be expected to engage more heavily in comparativism.³¹⁶

Our four East Asian case studies offer fresh perspective on these hypotheses. Although the substitution hypothesis makes logical sense, it does not appear to be the case that courts resort to comparativism only in the absence of sufficient domestic jurisprudence. The example of Canada is sometimes cited as support for the substitution hypothesis: it has been argued that two or three decades of judicial experience with the 1982 Charter of Rights and Freedoms led to a decline in the Canadian Supreme Court's use of foreign constitutional jurisprudence.³¹⁷ However, nearly as much time has elapsed in South Korea and Taiwan since democratization and the emergence of vigorous judicial review, yet the accumulation of over a quarter-century of domestic jurisprudence does not appear to have curtailed the practice of comparativism by either the KCC or TCC. Thus, at least for Korea and Taiwan, the habituation and circumvention hypotheses are more consistent with the evidence than the substitution hypothesis. It may be that the explanatory power of the substitution hypothesis turns at least partly on institutional factors that vary from court to court. For example, substitution of domestic for foreign jurisprudence may be less likely if a court has the time and resources to conduct both foreign and domestic legal research and thus is not forced to choose one at the expense of the other. The KCC, at least, fits this description.

NEW SOURCE OF INSPIRATION?, *supra* note 11, at 329, 330; Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 INT'L J. CONST. L. 269, 273 (2003) (citing the argument made by Domingo Sarmiento, future president of Argentina, that Argentinian courts ought to adhere strictly to American constitutional precedent in order to ensure that their case law does not simply reflect personal opinion); Voeten, *supra* note 307, at 553 ("Citing external sources . . . signals that legal reasoning is shared by others and thus is not arbitrary.").

³¹⁶ See Kalb, *supra* note 11, at 448.

³¹⁷ See HIRSCHL, *supra* note 11, at 33-34 (reviewing evidence of a "jurisprudential maturation" effect in Canada, Hong Kong, and India); Gentili, *supra* note 309, at 54 (attributing a decline in the Canadian Supreme Court's citation of foreign law to the growing availability of domestic precedent); Smithey, *supra* note 310, at 1199-1200, 1206 (finding evidence that foreign law citation in Canada and South Africa decreased as domestic precedent increased). *But see* Harding, *supra* note 16, at 411-12 (arguing that "the Supreme Court of Canada's use of foreign law has not diminished with the establishment of a uniquely Canadian body of law, but rather has increased in frequency and diversity"); La Forest, *supra* note 199, at 212, 217 (arguing that Canadian courts are characterized by "modern and expanding reliance on foreign materials," but also acknowledging that "recourse to American materials [may] become less necessary in the [constitutional] context as [Canada] develop[s] a more extensive and distinctive domestic jurisprudence").

It is also clear from the case studies that many judges value comparativism as a means of enhancing rather than undermining the legitimacy of judicial review. Whereas constitutional comparativism has attracted fierce criticism in the United States,³¹⁸ popular reaction may actually encourage the use of foreign law in places such as Korea, Taiwan, and Hong Kong. As a member of the TCC noted, the ability to say “this is how it’s done elsewhere” and “we used a foreign mainstream standard” can, in especially controversial or politically sensitive cases, provide a “kind of safe harbor” from criticism that a court is fashioning answers out of whole cloth to suit its own whims.³¹⁹ Judicial comparativism can have these legitimating effects, moreover, even if judicial style disfavors the explicit citation of foreign law. Those in the legal community have little difficulty recognizing the telltale signs of foreign jurisprudence.³²⁰ No footnote is necessary, for example, when the TCC suddenly introduces the terminology of “clear and present danger”³²¹ in a case involving public demonstrations.³²² As one justice observed: “Yes we say it in Chinese, but people know what it means in English.”³²³

No discussion of comparativism would be complete without at least some discussion of a variable that figures prominently in the comparative law literature—namely, the distinction between common law and civil law jurisdictions. Neither legal tradition appears to be inherently more conducive to comparativism than the other: within East Asia, one finds examples of both civil law and common law courts (the KCC and TCC on the one hand; the HKCFA on the other) that engage heavily in constitutional comparativism. That does not mean, however, that membership in a particular legal family has no implications for the practice of judicial comparativism. The effects of this variable are seen not in whether comparativism is practiced at all, but rather in how it is practiced.

First, common law courts tend to be more transparent about comparativism than civil law courts, in the sense that they are more likely to reveal their use of foreign law by explicitly citing it in their opinions.³²⁴ The

³¹⁸ See *supra* notes 30-35 and accompanying text.

³¹⁹ Interview with Justice J, *supra* note 236.

³²⁰ See Kalb, *supra* note 11, at 424 (observing that the adoption of “key foreign concepts” renders the influence of foreign sources “easy to detect in many decisions,” even if the sources themselves have not been explicitly identified).

³²¹ *Schenck v. United States*, 249 U.S. 47, 52 (1919).

³²² J.Y. Interpretation No. 445, 1998 SHIZI 15 (Constitutional Ct. Jan. 23, 1998) (Taiwan).

³²³ See Interview with Justice J, *supra* note 236 (discussing the sudden appearance of the “clear and present danger” test in Interpretation No. 445).

³²⁴ Cf. Tania Groppi & Marie-Claire Ponthoreau, *The Use of Foreign Precedents: A Limited Practice, An Uncertain Future* (noting an “almost perfect correlation” between whether a constitutional

HKCFA's citation practices render its opinions a more reliable indicator of foreign law usage than those of the KCC, TCC, or JSC. Second, membership in a particular legal family appears to have a substantial effect on which jurisdictions tend to be chosen for comparison. In East Asia, those jurisdictions that borrowed directly or indirectly from the German legal tradition continue to look toward Germany, whereas a history of British colonialism instead yields enduring jurisprudential ties to other Commonwealth nations. The result is what Alan Watson calls "transplant bias": courts do not "systematically search" for the most informative or relevant foreign models but instead return time and time again to a handful of favored examples.³²⁵ These examples will not necessarily be the most intellectually illuminating or substantively comparable ones but will instead reflect such factors as historical legacy and global prestige.³²⁶

VII. DIPLOMATIC EXPLANATIONS FOR COMPARATIVISM

Judges sometimes engage with foreign law and foreign courts for reasons that have little to do with the performance of legal or adjudicative functions. Their motivations can instead be more diplomatic than legal in character. Scholars may disagree over the normative desirability of judicial diplomacy,³²⁷ but as an empirical matter, judicial diplomacy is already occurring. And it is occurring because constitutional courts have both opportunities and incentives to practice it. Diplomacy may not be the primary responsibility of courts, but it is not entirely alien to them either.

Judicial diplomacy is an ambiguous term that could describe any of three conceptually distinct types of behavior, the last of which demands particular attention. First, ordinary diplomats may make instrumental use of courts, or

court explicitly cites foreign law and whether the court belongs to the common law or civil law tradition), in *THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES*, *supra* note 11, at 411, 412.

³²⁵ Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 U. PA. L. REV. 1121, 1146-47 (1983).

³²⁶ See *id.* at 1147; see also HIRSCHL, *supra* note 11, at 23, 41-68 (describing the Israeli Supreme Court's tendency to rely heavily on American and Canadian jurisprudence, while ignoring other, potentially more relevant bodies of law, as a strategy for identifying itself with high-prestige courts).

³²⁷ Compare JACKSON, *supra* note 19, at 123 (noting the possibility that judges may act as "diplomats," but arguing that courts should not view constitutional adjudication as a "positive opportunity to advance national interests" or promote their own international influence), with Noah Feldman, *When Judges Make Foreign Policy*, N.Y. TIMES, Sept. 28, 2008, (Magazine), at 57, 66 (arguing that "the fact that the Constitution affects our relations with the world requires the justices to have a foreign policy of their own," and that the Supreme Court should "weigh national and international interests" and consider how the Constitution is perceived abroad when engaging in constitutional interpretation).

seek to influence courts, in the course of conducting otherwise conventional diplomacy. The work of the courts may be used as a selling point in the quest for international leadership or acceptance, as in the case of State Department publications that educate international audiences about the U.S. Supreme Court³²⁸ or Israeli mailings of prominent Israeli Supreme Court decisions to American legal academics.³²⁹ Relatedly, diplomats may also seek to encourage courts to factor foreign policy considerations into their decisions, as when officials repeatedly drew the Supreme Court's attention to the damaging impact of racial segregation on international perceptions of the United States in the context of the Cold War.³³⁰

Second, judicial diplomacy might refer to the modes of interaction that courts adopt with one another.³³¹ For reasons ranging from the jurisdictional to the geopolitical, courts may find themselves employing stereotypically diplomatic tactics and instruments when dealing with foreign counterparts. The bywords for this kind of behavior are negotiation and agreement rather than adjudication and enforcement, tact and secrecy rather than transparency and justification. Multinational litigation can trigger judicial diplomacy of this sort: inter-court agreements for resolving global bankruptcies, for example, have been described as the equivalent of "case-specific, private international insolvency treaties."³³²

This variety of judicial diplomacy also surfaces as a strategy for navigating sensitive situations with a high risk of public embarrassment. For example, Taiwan's lack of diplomatic recognition requires the TCC to employ a diplomatic touch when interacting with foreign courts. If it wishes to invite foreign judges to Taiwan, it may try to avoid placing its guests in

³²⁸ See *infra* note 340 and accompanying text.

³²⁹ See Letter from Yariv Ovadia, Consul for Comm'n's & Pub. Affairs, Consulate Gen. of Isr. in L.A., Cal., to author (Mar. 8, 2005) (on file with author) (introducing a mailing of Israeli constitutional case law on the subject of torture to American legal scholars).

³³⁰ See MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 79-111 (2000) (describing both the arguments made on foreign policy grounds against racial segregation by both Justice Department and State Department officials, and the manner in which the State Department subsequently seized upon the Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), as "the counter to Soviet propaganda it had been looking for").

³³¹ See, e.g., SLAUGHTER, *supra* note 12, at 94-95 (reporting that the lack of international treaties or guidelines governing global bankruptcies has forced courts to create "their own regimes" consisting of "court-to-court agreements"); *id.* at 86 (noting that "courts are adapting the general notion of international comity, or the comity of nations, to fit the specific needs of courts" and "judges are actually negotiating with one another to determine which national court should take control over which part of multinational lawsuits").

³³² Evan D. Flaschen & Ronald J. Silverman, *Cross-Border Insolvency Cooperation Protocols*, 33 TEX. INT'L L. J. 587, 589 (1998).

an awkward position by holding a conference at a university then inviting judges to attend the conference, rather than asking foreign judges to visit the TCC itself in their official capacity.³³³ Similarly, the mere existence of formal relations or other agreements with other courts may demand confidentiality in order to prevent Chinese interference.³³⁴

The third and potentially most controversial form of judicial diplomacy—and the focus of the present discussion—is the judicial pursuit of foreign policy goals. The U.S. Supreme Court is a case in point. From time to time, members of the Court have alluded to the desirability of influencing international audiences in particular ways.³³⁵ A particularly revealing example is Justice Breyer’s explanation-cum-apology for his heavily criticized decision to cite the Supreme Court of Zimbabwe in an Eighth Amendment case.³³⁶ His comments warrant reproduction in full:

Look, let me be a little bit more frank, that in some of these countries there are institutions, courts that are trying to make their way in societies that didn’t used to be democratic, and they are trying to protect human rights, they are trying to protect democracy. They’re having a document called a constitution, and they want to be independent judges. And for years people all over the world have cited the Supreme Court, why don’t we cite them occasionally? They will then go to some of their legislators and others and say, “See, the Supreme Court of the United States cites us.” That might give them a leg up, even if we just say it’s an interesting example. So, you see, it shows we read their opinions. That’s important.³³⁷

³³³ See Interview with Justice M, Current or Former Member of the Constitutional Court of the Republic of China, in Taipei, Taiwan (June 13, 2014).

³³⁴ See *id.*

³³⁵ See, e.g., Kersch, *supra* note 45, at 789 (“The job before us . . . is to try to transfer knowledge from one nation to another, so that, despite cultural, historical, or institutional barriers, we can create fairer, more effective judicial systems, including safeguards of institutional integrity where they are now lacking.” (quoting a speech given by Justice Breyer at NYU Law School)); Toobin, *supra* note 14, at 50 (“Why should world opinion care that the American Administration wants to bring freedom to oppressed peoples? . . . If we are asking the rest of the world to adopt our idea of freedom, it does seem to me that there may be some mutuality there, that other nations and other peoples can define and interpret freedom in a way that’s at least instructive to us.” (quoting Justice Kennedy)).

³³⁶ See *Knight v. Florida*, 528 U.S. 990, 996 (1999) (Breyer, J., dissenting from denial of certiorari) (citing, *inter alia*, Catholic Comm’n for Justice & Peace in Zim. v. Att’y-Gen., [1993] 1 Zim. L. Rep. 239, 240, 269); see also Anderson, *supra* note 255, at 1306-07 (suggesting that Justice Breyer’s citation backfired by lending legitimacy not to the Zimbabwe Supreme Court, but instead to “Robert Mugabe’s wicked regime”).

³³⁷ Breyer & Scalia, *supra* note 14.

Extrajudicial remarks of this sort reveal a dimension of judicial motivation that is not made explicit in judicial opinions. What Justice Breyer describes is a form of judicial statecraft or diplomacy, directed at such goals as the promotion of judicial independence and the rule of law in other countries.³³⁸ Some may object that the Court has no business pursuing foreign policy objectives, much less citing foreign law.³³⁹ But it already does so. In collaboration with the State Department³⁴⁰ and through the Federal Judicial Center,³⁴¹ the Court works to improve the administration of justice and promote the rule of law in other countries.

The U.S. Supreme Court is far from alone in practicing judicial diplomacy of this ilk. Worldwide, it has become commonplace for judges to address themselves to foreign as well as domestic audiences. In a survey of supreme court judges from common law jurisdictions, almost one-fifth of respondents identified “the international community, broadly conceived” as part of the audience for their judgments.³⁴² With the reactions of the international community squarely in mind, constitutional courts have played a self-conscious role in bolstering or rehabilitating the international legitimacy of marginalized regimes³⁴³ and global superpowers³⁴⁴ alike.

³³⁸ See Alford, *supra* note 19, at 669 (noting the willingness of certain justices to use foreign law not simply to “resolve cases and controversies,” but also to “perform functions akin to foreign diplomats,” and describing Justice Kennedy in particular as “an evangelist for freedom abroad”); Kersch, *supra* note 45, at 784-85 (observing that “[i]nternational and transnational support” from judges in “well-established, advanced western democracies” can be “a life-line” for judges in “[p]ost-communist and post-colonial states” who “are often subjected to intense political pressures”); *Scalia-Breyer Conversation*, *supra* note 43, at 523 (“The United States Supreme Court has prestige in this area. Foreign courts refer to our decisions. And if we sometimes refer to their decisions, the references may help those struggling institutions.” (quoting Justice Breyer)).

³³⁹ See, e.g., Alford, *supra* note 19, at 670 (quoting former Attorney General Alberto Gonzalez’s admonishment that “[t]he Judiciary is not supposed to have a foreign policy independent of the political branches”).

³⁴⁰ For an example of glossy literature extolling the virtues of constitutionalism and the rule of law (and the Supreme Court as exemplar of said virtues), see BUREAU OF INT’L INFO. PROGRAMS, U.S. DEP’T OF STATE, *THE U.S. SUPREME COURT: EQUAL JUSTICE UNDER THE LAW* (2013).

³⁴¹ See *supra* note 22 and accompanying text.

³⁴² See Flanagan & Ahern, *supra* note 11, at 15-16.

³⁴³ See Law & Versteeg, *supra* note 6, at 1181-82 (citing Israel, South Africa, and Taiwan as examples of “marginal states” that “have courted foreign approval and enhanced their legitimacy by engaging in constitutional conformity”); Ronen Shamir, “Landmark Cases” and the *Reproduction of Legitimacy: The Case of Israel’s High Court of Justice*, 24 LAW & SOC’Y REV. 781, 783 (1990) (arguing that Israeli Supreme Court decisions concerning the occupied territories have not only “enhanced the court’s own legitimacy,” but also “legitimized Israeli rule over the territories”); Smithey, *supra* note 310, at 1196 (observing that South African judges were “explicit about their use of foreign precedent to underscore the legitimacy of the new constitutional regime”); see also JACKSON, *supra* note 19, at 255-56 (noting that the use of “good faith, public reasoning” by

Comparativism is just one of a number of strategies for conducting judicial diplomacy. Other common strategies include hosting international conferences, translating opinions for a broader audience, and participating in international organizations, but these are not the only possibilities. The KCC, for example, has adopted a creative, multi-pronged approach: its efforts to exercise international leadership have ranged from the relatively conventional moves of participating in the Venice Commission³⁴⁵ and organizing the AACC³⁴⁶ to the more unorthodox moves of hiring a celebrity athlete as goodwill ambassador³⁴⁷ and creating foreign-language cartoons for children.³⁴⁸

In some cases, these alternative strategies may be more effective or prudent than citing foreign law. For the U.S. Supreme Court, overt comparativism has the obvious drawback of inviting heavy criticism, and the fact that it occurs in service of foreign policy goals hardly makes it more palatable. Courts such as the KCC and TCC face a different problem: their opinion-writing conventions tend to favor relatively minimal citation of case law,³⁴⁹ which makes it harder for them to curry favor with foreign courts by citing foreign jurisprudence. Given this limitation, the KCC's resort to alternative strategies is unsurprising.

For other courts, however, importing foreign jurisprudence may be the best or most appropriate strategy available. The HKCFA illustrates how judicial comparativism in particular can be especially well suited to advancing political and economic interests at the international level. Hong Kong faces the challenge of maintaining its status as a global financial center and protecting the basic freedoms of its citizens despite the fact that it is at the mercy of the authoritarian, often oppressive regime in Beijing.³⁵⁰ Given the

constitutional courts "may contribute to [a] state's stature and negotiating power in the international community").

³⁴⁴ See DUDZIAK, *supra* note 330, at 90-114 (discussing the impact of Cold War geopolitical considerations on the Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954)); *supra* note 22 and accompanying text (describing the Federal Judicial Center's Office of International Judicial Relations).

³⁴⁵ See *supra* notes 168-70 and accompanying text.

³⁴⁶ See *supra* notes 172-74 and accompanying text.

³⁴⁷ See *supra* note 179 and accompanying text (noting Yuna Kim's appearance in multilingual promotional materials for the KCC).

³⁴⁸ See *Virtual Tour: Cartoon for Children*, CONST. CT. KOREA, <http://www.ccourt.go.kr/home/english/virtualtour/cartoon01.jsp> (last visited Feb. 28, 2015), *archived at* <http://perma.cc/Y4PE-V3BL> (introducing younger audiences to the work of the KCC via a series of English-language cartoons on the "Children's Constitutional Court").

³⁴⁹ See *supra* note 52 and accompanying text (discussing citation practices in the civil law world).

³⁵⁰ See, e.g., Keith Bradsher & Chris Buckley, *Protesters in Hong Kong Ease Sit-In at Government Headquarters*, N.Y. TIMES, Oct. 6, 2014, at A10 ("Real decision-making power on the side of the authorities rests in Beijing with China's president, Xi Jinping.").

lack of democratic governance in Hong Kong, the judiciary and the HKCFA in particular bear disproportionate responsibility for (1) protecting the basic rights and freedoms of Hong Kong residents; (2) upholding the autonomy of Hong Kong from the PRC under the “one country, two systems” constitutional rubric;³⁵¹ (3) defending the rule of law in Hong Kong from mainland Chinese encroachment or the appearance thereof; and (4) reassuring both domestic and international audiences, including the foreign businesses and investors that are the lifeblood of the economy, that Hong Kong remains autonomous and deserving of confidence.

The HKCFA’s heavy reliance on foreign law advances all of these goals. As Sir Anthony Mason, a non-permanent member of the HKCFA and former Chief Justice of Australia, has explained:

For a newly established court of final appeal, like the [HKCFA], comparative law has an added attraction. It is important that the Court’s decisions should be seen to conform to internationally accepted judicial standards. Indeed, for Hong Kong there is a double attraction: Hong Kong’s reputation as an international financial centre depends upon the integrity and standing of its courts. Further, in the context of Hong Kong’s relationship with the central government in Beijing, it is important that the decisions of the Hong Kong courts reflect adherence to the rule of law in accordance with internationally adopted judicial standards.³⁵²

³⁵¹ See Chen, *supra* note 259, at 272-73 (observing that the “internationalisation” of Hong Kong’s constitutional law is “at once a good in itself and a good means to enable Hong Kong to resist ‘mainlandization,’” and arguing that for purposes of “fortify[ing] Hong Kong against those forces coming from the mainland that may erode the freedoms and way of life that the people of Hong Kong cherish,” “there is everything to be gained, and nothing to lose, by attaching Hong Kong as firmly and closely as possible to the international system for the protection of human rights and fundamental freedoms”).

³⁵² Mason, *supra* note 305, at 302-03; see also, e.g., YASH GHAI, HONG KONG’S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW 323-24 (2d ed. 1999) (arguing that continuity with English law was seen as necessary to “reassure the business community” and “enhance the court’s prospects of independence”); Anselmo Reyes, *The Performance Interest in Hong Kong Contract Law* (“In the mind of investors, if the Hong Kong court were seen as too readily diverging from the common law applicable before July 1997, there would be concern that Hong Kong law was mutating into something unknown and uncertain. Rational or not, investors’ perceptions might then lead to doubts about the continuance of the rule of law in Hong Kong and that could jeopardize the free market strategy that is the cornerstone of Hong Kong’s well-being. In short, Hong Kong’s history is such that any change in the common law system, let alone radical change, risks being perceived by the outside world as introducing an element of capriciousness in the operation of the law.”), in REMEDIES FOR BREACH OF CONTRACT (Mindy Chen-Wishart et al. eds., forthcoming 2015) (manuscript at 1) (on file with author).

The benefits of tethering Hong Kong law to foreign law are in some sense analogous to the benefits of pegging the Hong Kong dollar to the U.S. dollar. Just as the currency peg stabilizes the Hong Kong dollar, the tethering of Hong Kong constitutional jurisprudence to the jurisprudence of a select handful of Commonwealth jurisdictions promotes the stability and continuity of Hong Kong Law. This stability and continuity, in turn, help to sustain foreign and domestic confidence in the quality and integrity of Hong Kong's judiciary and legal system.³⁵³ The challenges that Hong Kong faces in maintaining its international competitiveness and signaling its autonomy from China are ever-present background considerations that motivate judges to err on the side of citing more foreign law rather than less.³⁵⁴

VIII. INSTITUTIONAL EXPLANATIONS FOR COMPARATIVISM

Unlike the explanations discussed above in Parts VI and VII, institutional explanations for comparativism give due attention to the capabilities as well as the preferences of judicial actors. The institutional environment in which lawyers and judges find themselves shapes both their ability and their desire to engage in comparativism.

The impact of institutional variables on judicial ability to practice comparativism is straightforward. Courts will not use what they lack the ability to use, and by definition, a court that lacks the resources and mechanisms necessary to learn about foreign law in a systematic way will make at most limited use of foreign law. It is no coincidence that, among the five courts summarized in Table 1, there is a strong correlation between each court's institutional capacity for comparativism and the extent to which each court actually practices comparativism. Institutional capacity alone may not guarantee that judges will engage in comparativism, but it is a necessary condition: enthusiasm for foreign law on the part of individual judges makes little difference if it is not paired with the time and resources needed to investigate foreign law.

³⁵³ See Interview with Judge 1, *supra* note 265 (observing that the tethering of Hong Kong law to foreign law has a "conservatizing influence" on Hong Kong law and helps to reassure foreign audiences that Hong Kong remains a part of the common law world); Interview with Justice A, *supra* note 265 (agreeing that the practice of comparativism by Hong Kong courts has the effect of boosting foreign confidence in Hong Kong's legal system).

³⁵⁴ See Interview with Judge 1, *supra* note 265 (quoting a high-ranking Hong Kong judge's advice to continue citing "all these U.K. cases," even when it does not appear necessary to do so, because the practice reassures the rest of the world that Hong Kong's legal system remains up to international standards).

The impact of institutional variables on judicial preferences is less obvious but becomes apparent when we consider a key feature of the institutional environment in which courts operate—namely, the systems in place for training legal elites. Legal education inculcates skills and values that shape not only the capabilities, but also the preferences of legal elites. A system of legal education that fails to promote knowledge of foreign law is unlikely to produce lawyers and judges with either the ability or the desire to use foreign law.

Together, judicial comparativism, institutional capacity, and comparative legal education form a positive and self-sustaining feedback loop: each element stokes the development of the others. First, comparative legal education simultaneously stimulates judicial interest in foreign law and enhances the ability of courts to make use of foreign law. Second, judicial comparativism simultaneously generates demand for comparative legal education and gives courts a reason to invest in institutional mechanisms for learning about foreign law. Third, the existence of such institutional mechanisms simultaneously facilitates judicial comparativism and creates prestigious employment opportunities that incentivize lawyers to obtain comparative legal training, which completes the feedback loop.

It is thus a mistake to say that courts acquire institutional capacity only if judges are already interested in comparativism, or that institutional factors are merely epiphenomenal to judicial preferences. The level of judicial interest in comparativism is not logically antecedent to the level of institutional capacity for practicing comparativism. Rather, judicial interest in comparativism is endogenous to the institutional environment. By manipulating the institutional variables that regulate the supply of lawyers and judges with exposure to foreign law, it is possible to influence judicial demand for foreign legal expertise, and vice versa.

The relevant institutional variables can be divided into two categories: those involving the internal design of courts, and those involving legal education. This distinction is somewhat artificial, however, because the effects of institutional design and legal education are strongly interdependent.

A. *The Role of Institutional Design*

Judicial *usage* of foreign law cannot occur without judicial *awareness* of foreign law. Judges cannot make use of foreign examples that they simply do not know. In theory, there are two ways in which judges might gain the necessary awareness. The first is through judge-to-judge, or “J2J,” interaction.³⁵⁵ The second is through institutional mechanisms built into the

³⁵⁵ Law & Chang, *supra* note 11, at 535 (quoting a member of the TCC).

court itself, such as the availability of foreign-trained law clerks or the establishment of a research arm that specializes in foreign law. But these two mechanisms are not equally effective.

In practice, J2J interaction has proven neither necessary nor sufficient for judges to become sophisticated about foreign law.³⁵⁶ Comparison of Taiwan and the United States highlights the inadequacy of J2J interaction as a means for learning about foreign law. Opportunities for members of the TCC to interact with foreign judges are heavily constrained, whereas the members of the U.S. Supreme Court receive a steady stream of foreign visitors and are in high demand overseas. It would be difficult to argue, however, that American justices know more than Taiwanese justices about foreign law. Conferences and cocktail chatter with members of the German *Bundesverfassungsgericht* are poor substitutes for a doctorate in German law.³⁵⁷ By most accounts, the interactions that judges have with one another at international conferences and events are “likely to be brief”³⁵⁸ and dominated by “[s]mall talk” with insufficient time for “substantive discussion.”³⁵⁹ It may be that the members of the U.S. Supreme Court nevertheless learn from such interactions. If so, however, that may simply reflect a relatively low baseline level of knowledge.

Mechanisms for acquiring foreign legal expertise that are built into a court’s institutional structure are vastly more effective at promoting judicial comparativism than sporadic face-to-face interaction with foreign judges. Comparison of the JSC, KCC, TCC, and U.S. Supreme Court reinforces the commonsensical conclusion that courts with the institutional capacity to learn about foreign law make greater use of foreign law. Conversely, courts that lack such capacity are at a decisive disadvantage. Put simply, courts cannot do what they cannot do. Even a judge who wants to make comparative arguments will find it difficult to do without any institutional support either inside or outside the court.³⁶⁰

³⁵⁶ See BOBEK, *supra* note 11, at 49 (reporting that the type of knowledge obtained from judicial meetings, networks, and associations “tends to be superficial, selective, and random” and “is rarely of any use for national judicial decision-making”); *id.* at 74 (arguing that the impact of “informal exchanges and encounters . . . on judicial decision-making” has been “markedly exaggerated” in the debate over the propriety of judicial comparativism).

³⁵⁷ *Cf. id.* at 49 (observing on the basis of experience as a Czech judicial administrator that “most often, judges prefer to talk amongst themselves about anything other than their cases”).

³⁵⁸ Interview with Justice B, *supra* note 244 (indicating that a participant would be “lucky to speak to one person for one hour”).

³⁵⁹ Law & Chang, *supra* note 11, at 567 (quoting members of the TCC).

³⁶⁰ See Breyer, *supra* note 14 (observing that “[n]either I nor my law clerks can easily find relevant comparative material on our own,” and urging law professors to “supply that demand” by

Institutional capacity can be broken down into two components, institutional design and resources. Table 1 summarizes the design characteristics and resources that shape each court's capacity for foreign legal research. As this Table highlights, neither the JSC nor the U.S. Supreme Court boasts anything resembling the array of mechanisms and resources for foreign legal research available to the KCC or TCC. It is no coincidence that neither the JSC nor the U.S. Supreme Court rivals the KCC or TCC in their use of foreign law. All else being equal, if the resources available to a court include an array of foreign law specialists—as in South Korea and Taiwan—the result will be opportunistic usage of foreign law. Conversely, if resources for performing foreign legal research are scarce—as in the United States and, to a lesser degree, Japan—comparative analysis is likely to be less frequent.

In some cases, institutional mechanisms may be introduced for the purpose of facilitating comparativism. The KCC clearly falls in this category with its extensive array of researchers and advisers who are either hired for their foreign legal expertise or dispatched to study law overseas.³⁶¹ Institutional features need not be intentionally designed to promote comparativism, however, in order to have that effect. Consider the design of the TCC, which heightens the court's capacity for comparativism but in ways more subtle than the design of the KCC. Two of the most relevant design characteristics of the TCC are facially neutral but have a heavy impact when paired with the right resources.

The first design characteristic is the heavy representation of legal academics on the court, which is guaranteed by law.³⁶² On its face, the fact that a majority of the TCC's members are former law professors might seem inconsequential for the use of foreign law. However, the fact that constitutional scholars in Taiwan overwhelmingly possess foreign legal training renders their presence a *de facto* guarantee of the TCC's ability to engage in comparativism.³⁶³ By contrast, although Japanese law professors

equipping "the law students, who will become the lawyers, who will brief the courts" with the skills needed to make comparative arguments).

³⁶¹ See *supra* subsections III.D.2-4, III.D.6 (discussing the qualifications and expertise of the Constitutional Research Officers, the Constitutional Researchers, the Academic Advisers, the researchers at the CRI, and the foreign correspondents contracted by the CRI).

³⁶² See *infra* Table 1 (breaking down the composition of the TCC by professional background); *supra* note 202 and accompanying text (explaining the abundance of legal academics on the TCC).

³⁶³ See *supra* note 203 and accompanying text.

also tend to be knowledgeable in foreign law,³⁶⁴ they typically hold no more than one of the fifteen seats on the JSC.³⁶⁵

The second design characteristic, which interacts with the first, is the manner in which law clerks are recruited. Although Taiwan's justices are limited to one clerk each, they are free to select clerks of their own liking. By itself, the vesting of clerkship hiring in individual justices has little or no inherent tendency to facilitate comparativism: the KCC makes heavy use of foreign law notwithstanding the fact that its members have no say over who their clerks will be, while the Justices of the U.S. Supreme Court have free rein in clerk selection yet rarely engage in comparativism. The clerk recruitment method matters in the case of the TCC, however, because those making the hiring decisions are interested in foreign law and able to recruit from a pool of likeminded potential clerks. Any institutional design characteristic that gives individual justices control over resources also enables them to indulge their own proclivities, and in the case of the TCC, those proclivities happen to include comparativism.³⁶⁶ Fortunately for the justices, Taiwan's educational system generates an ample supply of law graduates with the necessary linguistic and comparative expertise.

Now consider, by contrast, the U.S. Supreme Court. Unlike its counterparts in Korea, Taiwan, and Hong Kong, it simply lacks the necessary institutional capacity to learn about foreign law in anything approaching a routine and systematic manner. There is no expectation or requirement, formal or informal, that the Justices have prior experience with foreign law, and they typically have no formal training in foreign legal systems.³⁶⁷ Nor,

³⁶⁴ See *infra* Table 1 (reporting the number and proportion of constitutional scholars at top Japanese law schools with foreign legal training).

³⁶⁵ See *supra* note 111 and accompanying text. As of this writing, the only former law professor on the JSC is Justice Kiyoko Okabe, who taught family law after lengthy service as a career judge. See OKABE Kiyoko, SUP. CT. JAPAN, <http://www.courts.go.jp/english/about/justice/okabe/index.html> (last visited Feb. 28, 2015), archived at <http://perma.cc/824S-XEZE>.

³⁶⁶ Cf. Tokuji Izumi, *Concerning the Japanese Public's Evaluation of Supreme Court Justices*, 88 WASH. U. L. REV. 1769, 1779 (2011) (suggesting, based on his experience as a member of the JSC, that enabling Japanese justices to select their own clerks "would invigorate the Court's deliberations, which in turn could lead to an increase in the Court's production of important jurisprudence").

³⁶⁷ Three of the four former academics on the Court as of this writing studied abroad over the course of their formal educations, but none focused on law during their time abroad. Justices Breyer and Kagan both hold degrees from Oxford, but not in law. See Elena Kagan, OYEZ, http://www.oyez.org/justices/elena_kagan (last visited Feb. 28, 2015), archived at <http://perma.cc/F6XK-KF7W> (indicating that Justice Kagan's field of study at Worcester College, Oxford, was philosophy); Stephen G. Breyer, OYEZ, http://www.oyez.org/justices/stephen_g_breyer (last visited Feb. 28, 2015), archived at <http://perma.cc/PYU8-QY8B> (indicating that Justice Breyer studied economics at Magdalen College, Oxford). Justice Scalia spent his junior year as an undergraduate at the University of Fribourg but focused on history, economics, and literature. See JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT

unlike some courts, does the U.S. Supreme Court even attempt to compensate for these deficiencies by hiring clerks or researchers with the kind of training, experience, or even language abilities, that might help fill the resulting knowledge gaps.³⁶⁸ Instead, the Court makes do with the help of recent graduates of America's top law schools—which generally do not require their students to learn about foreign law—and an obscure arm of the Library of Congress called the Directorate of Legal Research.³⁶⁹

These meager resources are no match for justices who have studied law overseas or spent decades publishing scholarly articles about foreign law, or a cadre of experienced professional researchers with foreign law degrees or, for that matter, an entire research institute dedicated to the study of

JUSTICE ANTONIN SCALIA 25 (2009). Justice Ginsburg did not study abroad but published repeatedly on the subject of Swedish civil procedure during her time as a law professor. *See, e.g.,* RUTH BADER GINSBURG & ANDERS BRUZELIUS, *CIVIL PROCEDURE IN SWEDEN* (1965); *Justice Ginsburg Interview*, *supra* note 11, at 805 (citing various scholarly works by then-Professor Ginsburg on Swedish law).

³⁶⁸ *See, e.g.,* Bentele, *supra* note 11, at 244 (noting that justices of the South African Constitutional Court “have the benefit of up to five clerks selected from applicants around the world” in addition to two South African law clerks); Somek, *supra* note 91, at 284 n.1 (attributing the Israeli Supreme Court’s prowess at comparative constitutional analysis in part to its “practice of employing clerks from all over the world, who do the research work on their country of origin”); *supra* subsection III.D.2 (discussing the practices of the “constitutional research officers” and foreign law specialists employed by the KCC).

A court need not employ clerks or justices who are literally foreign in order to possess high institutional capacity for learning about foreign law. Although the Canadian Supreme Court does not make a point of hiring clerks from other countries, it enjoys both an innate knowledge of, and capacity for learning about, foreign law that the U.S. Supreme Court lacks. The unwritten rules governing the allocation of seats on the Canadian court on the basis of geography guarantee that a sizeable portion of the justices are native francophones with a civil law background. *See* F.L. Morton, *Judicial Appointments in Post-Charter Canada: A System in Transition*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* 56, 59 (Kate Malleson & Peter H. Russell eds., 2006). So, too, are a sizeable fraction of the court’s clerks. The infrastructure for this legal and linguistic diversification is both intellectual and historical: Canada’s law schools provide a combination of common law and civil law training in a combination of English and French. *See* Aline Grenon & Louis Perret, *Globalization and Canadian Legal Education*, 43 S. TEX. L. REV. 543, 549-52 (2002) (describing how certain Canadian law schools ensure “direct access to Canada’s legal and linguistic duality” by offering both civil law and common law instruction in both official languages).

³⁶⁹ *See* Alford, *supra* note 18 (noting that in 2004, the Library of Congress received from “judicial agencies” 165 “research requests” pertaining to foreign law); Michael Ravnitzky, *The Directorate of Legal Research at the Library of Congress: A Treasure Hidden Under a Bushel Basket*, LLRX.COM (Nov. 22, 2006), <http://www.llrx.com/features/lclegalresearch.htm>, archived at <http://perma.cc/RS8C-7UWG> (describing the Directorate of Legal Research as a “research department contained within the Library of Congress” that “receives scant mention . . . even among the legal research community”).

comparative constitutional law.³⁷⁰ The result, as described by Justice Breyer, is hardly surprising: “Neither I nor my law clerks can easily find relevant comparative material on our own.”³⁷¹ If Justice Breyer—a seasoned scholar, a longtime champion of comparativism,³⁷² and the most widely traveled member of the Court³⁷³—cannot find the comparative material that he needs, what hope is there for the rest of the Court? Comparativism requires more than a willingness or desire on the part of individual judges to use foreign law. It also requires institutional support. When it comes to comparativism, the old adage does not hold true: where there is a will, there is not necessarily also a way.

B. *The Role of Legal Education*

Institutions cannot operate without resources, and no resource is more crucial to comparativism than an adequate supply of lawyers who know foreign law. Mechanisms for recruiting judges or clerks with training in foreign law make little difference if no one possesses the necessary training. Without the support of Taiwanese legal education, for example, neither the appointment of legal academics as justices nor the hiring of experienced law clerks would ensure the TCC’s engagement with foreign law. The recruitment practices of the TCC promote judicial comparativism because they tap into a deep talent pool of academics and law graduates with exposure to foreign law.

Similar mechanisms would be unlikely to succeed in the United States because American legal education fails to produce the necessary talent. Vicki Jackson has argued that there are a number of ways in which the U.S. Supreme Court might acquire the capacity to learn about foreign law in a fair, transparent, and accurate manner.³⁷⁴ These include briefing procedures that guarantee adequate and balanced participation by a combination of court-appointed experts and knowledgeable amici curiae,³⁷⁵ the hiring of foreign lawyers as clerks,³⁷⁶ and more generally efforts to ensure that it “has

³⁷⁰ See *supra* note 161 and accompanying text (noting that the Korean Constitutional Court, Peruvian Constitutional Court, and Argentinian Supreme Court all possess their own foreign law research institutes).

³⁷¹ See Breyer, *supra* note 14. When asked by the author, one of the Justices confirmed that the Court lacks personnel knowledgeable about foreign law, and that this lack of expertise discourages comparativism.

³⁷² See Law, *supra* note 15, at 653–54 & n.4 (citing various opinions and public pronouncements by Justice Breyer).

³⁷³ See *supra* note 28 and accompanying text.

³⁷⁴ See JACKSON, *supra* note 19, at 190–91.

³⁷⁵ *Id.*

³⁷⁶ *Id.* at 189.

within its institutional apparatus personnel with sufficient education and expertise to assist in research on issues of foreign or international law.”³⁷⁷ Even if the Court were willing to implement such institutional reforms, however, most of them presuppose a supply of foreign legal expertise that largely does not exist in this country. The United States does not boast an enormous pool of scholars who specialize in comparative constitutional law or attorneys with training in foreign constitutional law. Nor is it easy to import the necessary expertise, as Congress has by statute barred the hiring of foreign lawyers as law clerks.³⁷⁸

Legal education generates the expectations, values, and resources needed for judicial comparativism to flourish. In East Asia, law schools serve as both a source of substantive expertise in foreign law and a vehicle for normalizing and valorizing the use of foreign law. Legal education in Japan, Korea, Taiwan, and Hong Kong embodies the view that the study of foreign law is relevant, worthwhile, and conventional. The educational background of constitutional law professors at elite law schools might be considered a rough proxy for the extent to which legal education supports constitutional comparativism. All but one of the professors who teach constitutional law at Korea’s top three law schools have studied law in another country.³⁷⁹ The same is true of all eight of the constitutional law professors at Taiwan’s leading law school and of every tenure-track constitutional law professor at all three of Hong Kong’s law schools.³⁸⁰ Even in Japan, where judicial comparativism is less prevalent, most legal scholars possess deep knowledge of at least one foreign jurisdiction.³⁸¹ In the area of constitutional law specifically, one-quarter to two-thirds of the constitutional law faculty at the University of Tokyo, Keio University, and Waseda University possess some kind of foreign legal training.³⁸² Schools of this ilk, in turn, produce the lion’s

³⁷⁷ *Id.* The Korean Constitutional Court is pursuing such a strategy to a dramatic extent by establishing its own research institute to be staffed by scholars who are fluent in foreign languages. See *supra* subsection III.D.6.

³⁷⁸ See Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, § 704, 123 Stat. 3034, 3205-06 (2009) (providing that “no part of any appropriation . . . shall be used to pay the compensation of any officer or employee of the Government of the United States” who is not a citizen, a permanent resident “seeking citizenship,” a refugee who plans to pursue citizenship, or “a person who owes allegiance to the United States”).

³⁷⁹ All six of the full-time faculty identified on Seoul National University’s website as teaching constitutional law, and all five of the constitutional law professors identified on Yonsei University’s website, have studied law overseas. Five of the six constitutional law professors at Korea University have foreign legal training. See *infra* Table 1.

³⁸⁰ See *infra* Table 1.

³⁸¹ See *supra* note 113 and accompanying text.

³⁸² The fact that so many Japanese constitutional scholars have studied law abroad at some point is all the more remarkable in light of the traditional propensity of Japanese law schools to

share of the career judges, elite academics, and government officials who eventually become constitutional court justices.

By contrast, a system of legal education that simultaneously celebrates the exceptionalism and superiority of domestic law and relegates all consideration of foreign law to upper-year elective courses that are perceived as lacking practical applicability is not a system that will generate a meaningful supply of lawyers and judges with much appetite or aptitude for comparativism.³⁸³ For law schools to highlight and reinforce the status of comparative law as an endeavor distinct from, and secondary to, the ordinary work of lawyers and judges is to ensure that comparative law will be perceived as unimportant or irrelevant by judges. The result is the “vicious circle” described by former Israeli Chief Justice Aharon Barak: “[J]udges d[o] not tend to rely on comparative law; lawyers d[o] not cite comparative law to judges; law schools d[o] not stress comparative law; scholars d[o] not emphasise comparative law; judges d[o] not tend to rely on comparative law; etc.”³⁸⁴ Judicial behavior and legal education are mutually reinforcing and interdependent. Judicial indifference to comparative arguments gives law schools little incentive to stress comparative law, but law schools are simultaneously responsible for educating judges to be indifferent to comparative law.

This hypothetical system of legal education bears more than a passing resemblance to American legal education. There is no meaningful pool of

recruit professors directly out of their undergraduate legal studies. Until recently, law was an exclusively undergraduate subject in Japanese universities. See Chen, *supra* note 144, at 32-33; Shigenori Matsui, *Turbulence Ahead: The Future of Law Schools in Japan*, 62 J. LEGAL EDUC. 3, 4, 10-11 (2012) (describing Japan's adoption in 2002 of three-year graduate law schools alongside the existing four-year undergraduate curriculum in law); Setsuo Miyazawa & Hiroshi Otsuka, *Legal Education and the Reproduction of the Elite in Japan*, 1 ASIAN-PAC. L. & POL'Y J. 1, 24 (2000). At present, Japanese universities have both undergraduate law faculties and graduate law schools, which overlap to varying degrees. Matsui, *supra*, at 11. At Keio University, one of the graduate law school's three constitutional law professors has studied in the United States, while all three of the constitutional law specialists in the undergraduate law faculty have studied abroad. At Waseda University, two of the three constitutional law professors in the graduate law school and two of the five in the undergraduate law faculty have studied abroad. The University of Tokyo's graduate law school has three constitutional law specialists, one of whom has spent time in the United States as a visiting scholar. The undergraduate law faculty shares the same three constitutional law professors as the graduate law school, plus a constitutional theorist who has not studied abroad. These tallies are based on a survey of the relevant law school websites in various languages conducted by the author's multilingual research assistants circa August 2014.

³⁸³ See Law & Chang, *supra* note 11, at 576 (observing that the indifference of American law schools to comparative training precludes an “adequate supply of outstanding judges and clerks” with expertise in foreign law and serves as an “obstacle to the emergence of robust judicial comparativism”).

³⁸⁴ Aharon Barak, *Comparison in Public Law*, in JUDICIAL RECOURSE TO FOREIGN LAW: A NEW SOURCE OF INSPIRATION?, *supra* note 11, at 287, 287.

talent in the United States from which either potential clerks or judicial candidates with substantial foreign legal expertise can be recruited. Nor is foreign legal training made more attractive by the prospect of an academic job, as in East Asia or much of the rest of the world. Although law school hiring of teaching candidates who hold both a J.D. and a Ph.D. is accelerating, would-be law professors who obtained their law degrees in the United States do not go overseas for their Ph.Ds., and recent hiring trends offer little evidence that teaching candidates are rewarded by the job market for having foreign legal training.³⁸⁵ The dearth of such training on the part of the nation's law professors, meanwhile, tends to mean that little knowledge of, or interest in, foreign law will be imparted to the next generation of lawyers.³⁸⁶

Although legal education is an important determinant of judicial comparativism, its precise impact is difficult to pin down because it interacts in complex ways with many other variables. Legal education is deeply embedded in its social, political, and economic environment, meaning that it both shapes and is shaped by its environment. Consequently, the effect of legal education cannot be neatly isolated from the effect of other environmental factors. There can be little doubt, for example, that the extent to which a country's system of legal education fosters comparativism is influenced by market forces. All else being equal, lawyers from smaller countries have stronger economic incentives to learn foreign law: the sheer size of the American and Japanese economies³⁸⁷ means that American or Japanese lawyers who ignore foreign law sacrifice fewer opportunities than Korean or Taiwanese or Hong Kong lawyers who do the same. Student demand for comparative law presumably translates into increased educational offerings in comparative law. One could argue, therefore, that the emphasis in Korea on English fluency and knowledge of American law merely reflects the fact that those skills are prized by both foreign and

³⁸⁵ See Lawrence Solum, *Entry Level Hiring Survey 2010*, LEGAL THEORY BLOG (Apr. 12, 2010), <http://lsolum.typepad.com/legaltheory/2010/04/entry-level-hiring-survey-2010.html>, archived at <http://perma.cc/7MM3-BDVR> (listing the educational credentials of those hired into tenure-track teaching positions at American law schools in 2010); Lawrence Solum, *2009 Entry Level Hiring Report*, LEGAL THEORY BLOG (Apr. 26, 2009), <http://lsolum.typepad.com/legaltheory/2009/04/2009-entry-level-hiring-report.html>, archived at <http://perma.cc/S58K-XXRT> (doing the same for 2009).

³⁸⁶ Cf. Patrick M. McFadden, *Provincialism in United States Courts*, 81 CORNELL L. REV. 4, 37 (1995) (arguing that American courts eschew international law partly because it is both "unknown" and "unusual" to American judges and lawyers).

³⁸⁷ See INT'L MONETARY FUND, *WORLD ECONOMIC OUTLOOK DATABASE* (2013), available at <http://www.imf.org/external/pubs/ft/weo/2013/02/weodata/download.aspx> (identifying the United States, Japan, Korea, and Taiwan as having the first, third, fifteenth, and twenty-seventh largest economies in the world, respectively).

domestic employers.³⁸⁸ Conversely, one might conclude that American law schools offer little comparative training simply because American law students generally do not view such training as highly beneficial to their employment prospects.³⁸⁹

It would be a mistake, however, to view legal education as merely epiphenomenal to market forces, or to conclude that a lack of supply simply reflects a lack of demand. For a variety of reasons ranging from regulatory fiat³⁹⁰ to sheer confusion, the legal education industry responds imperfectly to economic conditions, and to the extent that it does respond, its responses are the product of internal debate over what those conditions happen to be and how best to respond. The result is that the standard American law school curriculum is hardly a faithful reflection of either student or employer demand. Run-of-the-mill legal employers in this country may not be clamoring for lawyers well versed in Chinese or German law, but they are unlikely to view presidential immunity or equal protection doctrine as enormous moneymakers either. From a market perspective, it seems just as arbitrary to make constitutional law mandatory as to make comparative law optional.³⁹¹ Indeed, market forces might even favor comparative law over constitutional law: ongoing weakness in the domestic employment market for lawyers,³⁹² combined with the growth of transnational legal practice and

³⁸⁸ See *supra* notes 141-42 and accompanying text (discussing the professional opportunities that English fluency and American legal training create for Korean attorneys).

³⁸⁹ See Krotoszynski, *supra* note 32, at 132 (noting the “chicken-and-egg problem” that “[l]aw schools do not invest major resources in international and comparative law offerings in part because domestic legal employers do not place much value on such training”).

³⁹⁰ See, e.g., BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* 12 (2012) (listing various accreditation requirements that prevent certain cost-cutting or price-cutting measures by law schools).

³⁹¹ The obvious rejoinder is that law schools mandate constitutional law because the Multi-state Bar Examination includes a constitutional law component. However, that merely begs the question of why bar examiners see fit to test constitutional law notwithstanding its irrelevance to the majority of legal practice, which in turn implicates the role of legal education in defining what is considered important by lawyers.

³⁹² See, e.g., Brian Z. Tamanaha, *Is Law School Worth the Cost?*, 63 J. LEGAL EDUC. 173, 174 (2013) (characterizing the job market for law graduates as “bleak” and “not likely to improve any time soon”); David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 9, 2011, § 3, at 1 (noting, inter alia, the disappearance of “some 15,000 attorney and legal-staff jobs at large law firms” from 2008 through the end of 2010). But see, e.g., Ronit Dinovitzer et al., *Buyers’ Remorse? An Empirical Assessment of the Desirability of a Lawyer Career*, 63 J. LEGAL EDUC. 211, 223-24 (2013) (arguing that “the conventional story of crisis is vastly oversimplified,” and that the availability of high-salary positions at large law firms for new graduates is a misleading measure of the economic value of legal education); Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree*, 43 J. LEGAL STUD. 249, 251, 253-59 (2014) (concluding on the basis of extensive statistical analysis that “law school remains a lucrative investment,” and estimating “a dramatic increase in earnings for law degree holders of approximately \$57,200 per year,” after controlling for hours worked).

overseas employment opportunities,³⁹³ may render foreign legal expertise an increasingly sensible investment. Neither legal educators nor bar examiners nor educational accreditation bodies are mere slaves to market demand. For better or for worse, they make choices with profound consequences for the ability of judges and lawyers to navigate an increasingly globalized world, and the choices they make are not necessarily optimal from a strictly economic perspective.

CONCLUSION: JUDICIAL DIPLOMACY AND JURISPRUDENTIAL NETWORKS

Judicial behavior is shaped not only by legal and political constraints, but also by institutional constraints. Comparativism is no exception. Institutional constraints on comparativism can take a variety of forms, ranging from docket pressures that limit opportunities for exploration³⁹⁴ to underinvestment in basic research tools.³⁹⁵ It is difficult to think of any institutional variable that plays a larger role in determining the prospects for comparativism, however, than legal education. An environment in which lawyers and judges are unfamiliar with foreign law is an environment in which courts will lack either the taste or the capacity for foreign legal research and judicial comparativism will be at best sporadic.

Comparativism is especially dependent upon institutional support because it is resource-intensive. A typical law clerk armed with a copy of the Federalist Papers and little else may be reasonably well equipped to engage in what passes for originalism,³⁹⁶ while textualism may call for little more than access

³⁹³ See, e.g., D. Daniel Sokol, *Globalization of Law Firms: A Survey of the Literature and a Research Agenda for Further Study*, 14 IND. J. GLOBAL LEGAL STUD. 5, 7-11 (2007) (describing empirically the global expansion of top law firms); *Not Entirely Free, Your Honour*, ECONOMIST, July 31, 2010, at 46 (discussing how a "talented graduate from any of the world's top law schools can expect a life of globe-trotting").

³⁹⁴ See *supra* notes 85-91 and accompanying text (discussing the docket pressures faced by the JSC and the implications of such pressures for a court's capacity to conduct foreign legal research).

³⁹⁵ See E-mail from Clerk 2, Current or Former Court Attorney to a Justice of the Supreme Court of the Philippines, to author (May 7, 2014, 8:57 AM EST) (on file with author) (noting that the "court library is virtually bare," "Westlaw access is limited to AmJur and Corpus Juris," and clerks have "no access" to the work of other courts "except through Google"); E-mail from Clerk 3, Current or Former Court Attorney to a Justice of the Supreme Court of the Philippines, to author (May 7, 2014, 11:20 AM EST) (on file with author) (describing the court library's collection as "prehistoric," and noting that access to the sole Westlaw subscription in each justice's chambers is rationed according to "office policy").

³⁹⁶ See, e.g., JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 11 (1996) (criticizing the Supreme Court's use of "originalist evidence" as "a mix of 'law office history' and justificatory rhetoric"); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 156 (describing the "law-office history" on display in the Court's opinions as "disastrous" from a historian's perspective).

to a handful of vintage dictionaries. But there is no obvious and equivalent shortcut that American judges can use to perform even a watered-down version of comparativism. No amount of personal enthusiasm or international travel on the part of the Justices is likely to make up for the fact that—unlike the members of the Korean Constitutional Court—they lack a full-time staff of comparativists to navigate literally an entire world of foreign law.³⁹⁷ Nor is technology alone the solution. Anyone can operate an Internet search engine and locate foreign legal materials,³⁹⁸ but very few can digest the results.³⁹⁹ Critics of comparativism⁴⁰⁰ and sophisticated comparativists⁴⁰¹ alike have drawn attention to the perils of invoking foreign law without the knowledge needed to place that law in context. The requisite understanding of context is not simply a Google search away. Neither the competence nor the confidence to engage in comparativism can easily be acquired without meaningful investment in infrastructure and education.

What distinguishes comparativism even more sharply from other judicial practices, however, is the fact that it is not merely a type of legal argumentation, but also a form of judicial diplomacy. Scholars may disagree over the normative desirability of judicial diplomacy,⁴⁰² but as an empirical matter, it is already commonplace. Why else, for example, would courts in non-English-speaking countries go to the trouble and expense of translating

³⁹⁷ See Breyer, *supra* note 14 (urging American law professors to help solve the problem by equipping “the law students, who will become the lawyers, who will brief the courts” with the skills needed to make comparative arguments).

³⁹⁸ See HIRSCHL, *supra* note 11, at 3 (noting that “[v]irtually all reputable peak courts across the globe maintain websites where thousands of rulings . . . may be browsed with ease,” and that new online portals allow easy retrieval and comparison of “the entire corpus of constitutional texts around the world”).

³⁹⁹ See Law, *supra* note 47, at 153–54 (observing that an online search for information on rare genetic disorders inundates the user with information that is of little use without advanced scientific training, and querying whether there is “any reason to doubt that online comparative research performed by judges and clerks without prior training in foreign law would be plagued by precisely the same problems”).

⁴⁰⁰ See, e.g., *Scalia–Breyer Conversation*, *supra* note 43, at 528–29 (“One of the difficulties of using foreign law is that you don’t understand what the surrounding jurisprudence is. So that you can say, for example, ‘Russia follows *Miranda*,’ but you don’t know that Russia doesn’t have an exclusionary rule.” (quoting Justice Scalia)).

⁴⁰¹ As Sir Anthony Mason—an unusually experienced comparativist who has served on the highest courts of Australia, Hong Kong, and Fiji—has observed, the public law of other countries “cannot be understood or applied in the absence of a comprehensive understanding of its political, historical, social and cultural context.” Mason, *supra* note 305, at 305; see also *id.* at 306 (observing that even a judge already familiar with multiple jurisdictions “may feel that he or she lacks the understanding of other systems of law needed to embrace judicial decisions of those other systems”).

⁴⁰² See *supra* note 327 and accompanying text.

their opinions into English and maintaining English-language websites?⁴⁰³ Why would any court operate an entire research institute for the purpose of conducting foreign legal research that has no direct bearing on actual cases?⁴⁰⁴ Why would a court invest considerable resources in launching international organizations and hosting international conferences?⁴⁰⁵ Why do judges who are already highly sophisticated about foreign law, and who learn relatively little of substance from actual dialogue with foreign jurists, nevertheless place a premium upon participating in such dialogue?⁴⁰⁶ Why would judges ever cite foreign law to a greater degree than they themselves consider necessary?⁴⁰⁷ Without the concept of judicial diplomacy, all of these practices are somewhat mystifying. But the idea that courts pursue diplomatic objectives and compete for prestige and influence makes sense of all of them.

The phenomenon of judicial diplomacy poses an obvious challenge to traditional conceptions of the role and function of constitutional courts. But its arrival on the global scene seems inevitable. Constitutional courts have long occupied the grey area between law and politics.⁴⁰⁸ In the face of globalization, it should come as no surprise that they have begun to blur the distinction between law and diplomacy as well. The more that courts interact with one another, the less likely that they will concern themselves

⁴⁰³ The JSC, KCC, and TCC, for example, all operate English-language websites that feature English translations of their decisions. See *Decisions*, CONST. CT. KOREA, <http://english.court.go.kr> (last visited Feb. 28, 2015), archived at <http://www.perma.cc/3BAE-RG48> (select “Decisions” from the title bar); *Interpretations*, JUD. YUAN, <http://www.judicial.gov.tw/constitutionalcourt/en/p03.asp> (last visited Feb. 28, 2015), archived at <http://perma.cc/A3C2-LAJQ>; *Judgments of the Supreme Court*, SUP. CT. JAPAN, <http://www.courts.go.jp/english/judgments/index.html> (last visited Feb. 28, 2015), archived at <http://perma.cc/3BAE-RG48>.

⁴⁰⁴ See *supra* subsection III.D.6 (discussing the KCC’s Constitutional Research Institute).

⁴⁰⁵ See *supra* Section III.E (describing the KCC’s role in organizing and hosting various international judicial groups and conferences).

⁴⁰⁶ See *supra* text accompanying notes 358–59 (observing that various members of the JSC, KCC, and TCC were all hard-pressed to identify cases in which J2J interaction had taught them “something truly new or unfamiliar” about foreign law).

⁴⁰⁷ See *supra* note 354 and accompanying text (describing a high-ranking Hong Kong judge’s encouragement to err on the side of citing British law, even if citation is not strictly necessary, as a way of reassuring external audiences that the legal system in Hong Kong continues to meet international standards).

⁴⁰⁸ Hans Kelsen’s rationale for advocating separate constitutional courts, and for excluding human rights from constitutions, was that constitutional adjudication (and rights adjudication in particular) commingles law and politics and contaminates the judiciary by turning judges into lawmakers. See Miguel Schor, *Judicial Review and American Constitutional Exceptionalism*, 46 OSGOOD HALL L.J. 535, 554–55 (2008) (describing Kelsen’s acknowledgment of the “political nature” of constitutional law and the character of constitutional adjudication as “lawmaking”); Alec Stone Sweet, *Why Europe Rejected American Judicial Review—And Why It May Not Matter*, 101 MICH. L. REV. 2744, 2767–68 (2003) (noting Kelsen’s opposition to adjudication of rights claims for fear that “judges would become the lawmakers” and thereby invite “political backlash”).

only with the reactions of domestic audiences, and the more likely it becomes that they will behave in ways intended to influence those in other countries. Sustained interaction among judges of talent and ambition is bound to give rise to a desire for recognition and prestige on the part of some participants.⁴⁰⁹ Meanwhile, the multiplication of hybrid political arrangements that combine traditional states with supranational governance and autonomous regions⁴¹⁰ increasingly places courts in the position of having to formulate quasi-diplomatic strategies for defining and navigating novel relationships among competing sovereigns.

Judicial diplomacy and judicial dialogue are both metaphors for the cross-border interaction that transpires among courts, but they emphasize very different aspects of that interaction. Whereas the dialogue metaphor implies communication among open-minded peers for the sake of mutual learning and reasoned problem-solving,⁴¹¹ the diplomacy metaphor evokes a world in which competing courts jockey for influence and prestige and the outcome of their competition depends on factors that are more geopolitical than intellectual in nature. The dialogue metaphor certainly paints the more flattering picture of judicial behavior, but it does not capture the whole truth. Transnational judicial interaction in the twenty-first century is not simply an exercise in collective learning or intellectual debate. It is also, as the diplomacy metaphor suggests, an exercise in power politics.

The political and diplomatic dimensions of transnational judicial interaction are highly evident in East Asia. For the HKCFA, heavy reliance on foreign jurists and foreign law is a way of asserting and reinforcing the autonomy from the PRC that Hong Kong is supposed to enjoy pursuant to

⁴⁰⁹ See JEAN-JACQUES ROUSSEAU, *Discourse on the Origin and Foundations of Inequality Among Men* (arguing that social interaction causes people first to compare themselves to others, then to seek superiority over others) ("Everyone began to look at everyone else and to wish to be looked at himself, and public esteem acquired a price."), reprinted in *THE DISCOURSES AND OTHER EARLY POLITICAL WRITINGS* 113, 166 (Victor Gourevitch ed. & trans., Cambridge Univ. Press 1997) (1755).

⁴¹⁰ See James N. Rosenau, *Governance in a New Global Order* (coining the term "framegration" to describe the ongoing "clash between globalization, centralization and integration on the one hand, and localization, decentralization and fragmentation on the other," which has resulted in a "bifurcated system" that combines traditional nation-states with a competing "multicentric system" of both supranational and local authorities), in *GOVERNING GLOBALIZATION: POWER, AUTHORITY AND GLOBAL GOVERNANCE* 70, 70-73 (David Held & Anthony McGrew eds., 2002).

⁴¹¹ See SLAUGHTER, *supra* note 12, at 70 (describing a "growing dialogue" among constitutional court judges "around the world on the issues that arise before them" that "both contribute[s] to a nascent global jurisprudence on particular issues and improve[s] the quality of their particular national decisions"); Law & Chang, *supra* note 11, at 531 ("The metaphor of dialogue is . . . attractive because it both implies and promises that all participants are both entitled and empowered to speak. . . . Dialogue is supposed to be inclusive, and it is supposed to involve mutual engagement. Therein lies much of its appeal.").

treaty arrangements. For the TCC, efforts to interact with other courts become delicate exercises in diplomacy because such interaction circumvents Taiwan's lack of diplomatic recognition and runs the risk of antagonizing the PRC. For the KCC, mastery of foreign law and engagement with international organizations are elements of a multi-pronged strategy aimed at winning regional and global influence.

Such influence will not be easily won. Any court that wishes to claim the mantle of constitutional leadership in East Asia must contend with the twin titans of the German *Bundesverfassungsgericht* and the U.S. Supreme Court.⁴¹² A current jurisprudential map of the region would depict a tug-of-war between two constitutional superpowers, with Germany regaining the upper hand in Taiwan while the United States gains strength in Korea. But the KCC's prospects are improved by the fact that the JSC is a fast-fading competitor. Notwithstanding the formidable historical advantages conferred by the colonial imposition of Japanese law, the loss of interest in Japanese constitutional law among Japan's closest neighbors is palpable.⁴¹³

Even if judicial diplomacy can help a well-funded court from a mid-sized country such as Korea to become more influential and prestigious within a particular region, success on a worldwide scale may remain elusive. The globalization of constitutional law is characterized not only by the emergence of generic or universal elements, but also by the persistence of distinct constitutional families.⁴¹⁴ Judging from the patterns of judicial comparativism seen in East Asia, it is difficult for constitutional courts to exercise influence outside their own networks.⁴¹⁵ This appears to be true for the *Bundesverfassungsgericht*, which is prominent and well-respected yet lacks a dedicated following outside the civil law world that is commensurate with

⁴¹² See *Overview*, *supra* note 176 (announcing that the KCC used its hosting of the World Conference on Constitutional Justice as an opportunity to promote "beyond Asia" a "Korean system of constitutional justice" that "differs from the German or U.S. models"); Telephone Interview with Unnamed Official, *supra* note 127 (reporting that former KCC Chief Justice Lee Kang-Kook viewed the courts of Germany, Austria, and the United States as embodying "mainstream constitutional jurisprudence," and noting a "general consensus" in Korean constitutional circles that the German *Bundesverfassungsgericht* and U.S. Supreme Court are the "big two").

⁴¹³ See *supra* Section III.C (discussing the KCC's growing indifference to Japanese constitutional jurisprudence); *supra* note 192 and accompanying text & Section IV.C (describing the declining influence of Japanese constitutional jurisprudence in Taiwan).

⁴¹⁴ See Law & Versteeg, *supra* note 6, at 1221-26, 1243 (concluding on the basis of an empirical analysis of constitutional drafting patterns that global constitutionalism is characterized by both "a strong and growing generic component" and an ideological divide between two families of constitutions, one of which draws heavily upon the "Anglo-American legal tradition").

⁴¹⁵ See Chang & Yeh, *supra* note 44, at 1175 ("Trans-regional discourse [among constitutional courts] is rare, and even if it does occur, it usually takes place between courts of the same legal family, civil law or common law.").

its reputation.⁴¹⁶ Likewise, the Canadian Supreme Court and South African Constitutional Court are both praised for their global influence,⁴¹⁷ yet neither has established a foothold in East Asia outside the common law outpost of Hong Kong.⁴¹⁸ Just as the influence of the Canadian Charter of Rights and Freedoms on constitutional drafting appears to be confined largely to the common law world,⁴¹⁹ it may be that the Canadian Supreme Court and South African Constitutional Court carry little weight beyond a niche market of other common law courts in the English-speaking world.

The traditional cleavage between civil law and common law countries has not disappeared in the face of globalization but instead lingers in the form of jurisprudential networks and spheres of influence. It is consequently a grave error for English-speaking scholars to assume that the practice of comparativism in their own countries resembles the practice of comparativism in the rest of the world. Scholars have already noted the existence of a “Commonwealth model of constitutionalism” defined by distinctive forms of judicial

⁴¹⁶ The influence of the *Bundesverfassungsgericht* is, of course, not exclusively limited to civil law countries. See, e.g., HIRSCHL, *supra* note 11, at 47 (noting the Israeli Supreme Court’s citation of constitutional jurisprudence from Germany in addition to a variety of common law countries); Navot, *supra* note 90, at 145 fig.4 (reporting that 5.5% of the Israeli Supreme Court’s foreign law citations are to Germany). Not even Israel, however, offers especially strong evidence that civil law courts enjoy influence outside the civil law world. First, Israel is not a purely common law jurisdiction but instead has both common law and civil law characteristics. See *JuriGlobe—World Legal Systems: Mixed Legal Systems*, U. OTTAWA, <http://www.juriglobe.ca/eng/sys-juri/class-poli/sys-mixtes.php> (last visited Feb. 28, 2015), archived at <http://perma.cc/VJG7-ZLNL> (classifying Israel as possessing a “mixed system” of civil law, common law, Jewish law and Muslim law). Second, notwithstanding its mixed legal heritage, Israel still exhibits a bias in favor of other common law jurisdictions, with Germany constituting the exception to the rule. See HIRSCHL, *supra* note 11, at 43 (noting that the Israeli Supreme Court most frequently cites “American, Canadian, British, and German rulings”); Navot, *supra* note 90, at 145–47 (highlighting the dominance of citations to common law jurisdictions, and deeming the Israeli Supreme Court’s “minimal number of references to continental courts . . . surprising in view of the fact that several constitutional-institutional issues that the ISC addressed are addressed by European countries as well”).

⁴¹⁷ See sources cited *supra* note 98.

⁴¹⁸ Even in Hong Kong, references to South African jurisprudence are rare. See Young, *supra* note 242, at 82 tbl.10 (reporting that only 2% of the HKCFA’s case law citations are to “other national courts,” a category that includes all courts in Africa, Latin America, the Middle East, and all parts of Europe apart from the United Kingdom); Interview with Justice B, *supra* note 244 (indicating that Canadian and South African decisions are cited less frequently than other jurisdictions because they are “not cited as often to us by counsel,” but that Canada is still cited “more than South Africa”).

⁴¹⁹ See Law & Versteeg, *supra* note 1, at 818–21 (finding “robust and growing constitutional similarity between Canada and other members of the common law family” and concluding that “Canada is, at least to some degree, a constitutional trendsetter among common law countries,” but finding no evidence that Canada is emulated by “the rest of the world”).

review⁴²⁰ and packages of constitutional rights.⁴²¹ The indifference of Japanese, Korean, and Taiwanese courts to the leading lights of the common law world underscores yet another characteristic of the Commonwealth model—namely, membership in a somewhat insular jurisprudential network that not everyone necessarily cares to join.⁴²²

The ECtHR and the U.S. Supreme Court may be the only courts that truly bridge the divide between these two jurisprudential networks. At present, they are the only common points of reference for constitutional courts throughout East Asia. In the case of the ECtHR, there is no shortage of explanations for this crossover appeal. First, the court itself belongs to both networks: its jurisdiction and its expertise span a combination of civil law and common law countries.⁴²³ Second, the ECtHR is a mouthpiece for constitutional jurisprudence in an entire region of the world. To follow the ECtHR is to follow the practice of not just one or two countries, but forty-seven countries,⁴²⁴ many of which are highly prestigious in their own right. Any appeal to the existence of widely shared norms or practices is thus

⁴²⁰ Stephen Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism*, 8 INT'L J. CONST. L. 167, 167-68 (2010) (identifying a "new Commonwealth model of constitutionalism" in the form of institutional variants of judicial review that seek to reconcile parliamentary and judicial supremacy).

⁴²¹ See Law & Versteeg, *supra* note 1, at 821 (finding evidence of a constitutional "split between common law countries and the rest of the world" in the form of the emergence of a "Commonwealth model of constitutionalism" that encompasses "not only a set of institutional mechanisms for reconciling judicial and legislative power, but also a set of substantive rights guarantees and limitations"); Law & Versteeg, *supra* note 6, at 1170, 1221-25 (finding as an empirical matter that constitutions divide ideologically into "statist" and "libertarian" camps, the latter of which is characterized by the inclusion of historically "Anglo-American" rights provisions that "epitomize a common law tradition of negative liberty and, more specifically, judicial protection from detention or bodily harm at the hands of the state").

⁴²² See, e.g., BOBEK, *supra* note 11, at 84-87, 95 (discussing the strong tendency of British courts to cite courts from other Commonwealth countries rather than other European countries, "even when interpreting European laws of a unified European asylum system," and observing that "in the cases in which English judges have a choice left as to the authority they wish to rely upon . . . their attention remains fixed on the English-speaking common law countries outside of Europe"); Flanagan & Ahern, *supra* note 11, at 21 (reporting that eleven out of forty-three respondents to a survey of supreme court judges from common law jurisdictions indicated that "in a judgment about domestic rights," they would cite foreign law only from other common law jurisdictions); Gentili, *supra* note 309, at 57-59 & 57 tbl.2, 59 graph 4 (reporting that roughly 95% of the Canadian Supreme Court's citations to foreign precedent are to decisions from common law jurisdictions).

⁴²³ See EUR. COURT OF HUMAN RIGHTS, JUDGES OF THE COURT SINCE 1959 (2015), available at http://www.echr.coe.int/Documents/List_judges_since_1959_ENG.pdf (listing all judges who have served on the ECtHR since 1959, including a number from Ireland and the United Kingdom).

⁴²⁴ See *Our Member States*, COUNCIL EUR., <http://www.coe.int/en/web/about-us/our-member-states> (last visited Feb. 28, 2015), archived at <http://perma.cc/8BSG-V7FP> (listing the member states of the Council of Europe).

bolstered if the jurisprudence of the ECtHR can be invoked. Third, the substantial overlap between the European Convention on Human Rights (ECHR), which the ECtHR is charged with enforcing, and the International Covenant on Civil and Political Rights (ICCPR)⁴²⁵ means that courts faced with the task of interpreting the ICCPR or analogous instruments have a natural reason to consider the case law of the ECtHR.⁴²⁶

The crossover appeal of the U.S. Supreme Court, by comparison, cannot be taken for granted. Not only does the Supreme Court lack the aforementioned advantages of the ECtHR, but there is also mounting evidence that the global influence of American constitutionalism is in decline.⁴²⁷ The persistence of the Court's influence in a particular corner of the globe is open to a number of possible explanations. It may be that East Asia is atypically receptive to American influence, for example, or that foreign interest in American constitutional jurisprudence still has a long way to fall before it disappears. The latter view is more than plausible. The U.S. Supreme Court pioneered the practice of judicial review and continues to boast one of the most extensive bodies of constitutional jurisprudence in the world. Even if constitutional courts elsewhere have indeed grown increasingly lukewarm toward its work, the recognition and prestige that it earned over the course of two centuries are unlikely to dissipate overnight.

It is increasingly clear, however, that the Court faces greater competition than ever for the attention of foreign audiences. Other courts are now at least as eager to export their own jurisprudence, and the forces of globalization only make it easier for them to do so. Whether the U.S. Supreme Court's influence overseas will endure in the face of old rivals and new challengers alike is likely to depend on factors as diverse as the availability of overseas scholarships,⁴²⁸ the attractiveness of the U.S. legal market, and

⁴²⁵ See Law & Versteeg, *supra* note 1, at 845 ("The ECHR, like the ICCPR, primarily features traditional, first-generation civil and political rights.").

⁴²⁶ See, e.g., *Lam Siu Po v. Comm'r of Police*, [2009] 12 H.K.C.F.A.R. 237, 263B (C.F.A.) (H.K.) (deeming the ECtHR's jurisprudence on article 6(1) of the ECHR "of immediate relevance" to interpretation of article 14.1 of the ICCPR "notwithstanding certain differences in wording").

⁴²⁷ See Law & Versteeg, *supra* note 1, at 766-68, 799-804 (summarizing the existing literature on the declining influence of American constitutional jurisprudence, and documenting empirically the declining influence of the U.S. Constitution on constitutional drafting practices); *id.* at 768 & n.18 (reviewing various empirical studies to the effect that "citation to U.S. Supreme Court decisions by foreign courts is in fact on the decline"); Liptak, *supra* note 98 (reporting that foreign courts are paying decreasing attention to American jurisprudence, particularly in the area of constitutional rights).

⁴²⁸ German and American investment in the education of foreign lawyers has paid tangible dividends in Taiwan. Historically, the prevalence of citations to German law as opposed to U.S. law has tracked the balance of power on the TCC between former *Deutsche Akademischer Austausch Dienst* scholars (funded by Germany) and former Fulbright scholars (funded by the United States).

the status of English as the lingua franca of law and commerce. But a little judicial diplomacy could not hurt either.

See Law & Chang, *supra* note 11, at 576-77 & 577 n.18. Germany also invests in the training of foreign lawyers via the government-funded Humboldt Foundation, which counts various prominent foreign jurists among the recipients of its fellowships. *See, e.g.*, Press Release, Alexander von Humboldt Found., Humboldtian Elected President of Hungary (June 7, 2005), *available at* <http://www.humboldt-foundation.de/web/33749.html> (hailing the election of Laszlo Solyom, former chairman of the Hungarian Constitutional Court and former Humboldt Fellow, as President of Hungary).

Table 1: Comparative Overview of Constitutional Adjudication in Japan, South Korea, Taiwan, Hong Kong, and the United States

	Japan	South Korea	Taiwan	Hong Kong	United States
Court with final authority over constitutional questions	Supreme Court of Japan (general jurisdiction)	Constitutional Court of Korea (specialized jurisdiction)	Constitutional Court of the Republic of China (specialized jurisdiction)	Hong Kong Court of Final Appeal (general jurisdiction)	U.S. Supreme Court (general jurisdiction)
Docket (cases filed per year)	12,000+ ⁴²⁹	1,500+ ⁴³⁰	500 ⁴³¹	115 ⁴³²	10,000+ ⁴³³
Decisions per year	12,000+ ⁴³⁴	1,500+ ⁴³⁵	20-30 ⁴³⁶	20-30 ⁴³⁷	100 ⁴³⁸
Number of justices	15	9	15	No fixed number; at least 4 permanent justices (PJ), plus up to 30 non-permanent justices from Hong Kong (HKNPJ) and overseas (ONPJ) ⁴³⁹	9

⁴²⁹ See *supra* note 85 and accompanying text.

⁴³⁰ See *supra* note 88 and accompanying text (reporting docket statistics for the KCC as of 2013).

⁴³¹ *Justices of the Constitutional Court: Cases Commenced, Terminated, and Pending*, *supra* note 89.

⁴³² Young & Da Roza, *supra* note 284, at 1 (reporting that, over its first thirteen years of existence, the HKCFA “disposed of approximately 1162 applications for leave [to appeal], averaging 89 applications per year” and “decided 325 cases, averaging about 25 cases per year”).

⁴³³ *The Justices’ Caseload*, *supra* note 87.

⁴³⁴ See *supra* note 85 and accompanying text.

⁴³⁵ See *supra* note 88 and accompanying text.

⁴³⁶ Law & Chang, *supra* note 11, at 547–48.

⁴³⁷ See Young, *supra* note 242, at 69.

⁴³⁸ *The Justices’ Caseload*, *supra* note 87.

⁴³⁹ Hong Kong Court of Final Appeal Ordinance, (1997) Cap. 484, 3-4, §§ 5(5), 10 (H.K.). The minimum of four permanent justices includes the Chief Justice. *Id.* § 5.

	Japan	South Korea	Taiwan	Hong Kong	United States
Term of justices	Retention election after initial appointment then at 10-year intervals thereafter; mandatory retirement at 70 ⁴⁴⁰	6 years; subject to reappointment; mandatory retirement at 65 (70 for President of KCC) ⁴⁴¹	8 years; cannot be reappointed to consecutive term ⁴⁴²	PJ: Guaranteed tenure until age 65, with possibility of up to 2 additional 3-year terms ⁴⁴³ HKNPJ, ONPJ: Renewable 3-year terms; no age limit ⁴⁴⁴	Life ⁴⁴⁵
Appointment of justices	Appointed by Cabinet ⁴⁴⁶	Appointed by President; 1/3 nominated by National Assembly; 1/3 nominated by Chief Justice of Supreme Court ⁴⁴⁷	Nominated by President; confirmed by Legislative Yuan ⁴⁴⁸	Appointed by Chief Executive on recommendation of judicial nominating commission	Nominated by President; confirmed by Senate

⁴⁴⁰ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 79 (Japan).

⁴⁴¹ Constitutional Court Act, Act No. 4017, Aug. 5, 1988, art. 7 (S. Kor.), translated in 1 STATUTES OF THE REPUBLIC OF KOREA 93 (Korea Legislation Research Inst. 1997 & Supp. 51).

⁴⁴² The President and Vice President of the Judicial Yuan are also members of the Constitutional Court (the President doubles as the Chief Justice) but do not enjoy the constitutional guarantee of an eight-year term. Minguo Xianfa Zengxiu Tiaowen art. 5 (2005) (Taiwan).

⁴⁴³ Hong Kong Court of Final Appeal Ordinance, (1997) Cap. 484, 3-4, § 14(b) (H.K.).

⁴⁴⁴ Id. §§ 14(3), 14(4).

⁴⁴⁵ U.S. CONST. art. III, § 1 (providing that judges of both "the supreme and inferior Courts, shall hold their Offices during good behaviour").

⁴⁴⁶ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 79, para. 1 (Japan). Technically, the Chief Justice is appointed by the Emperor but is "designated by the Cabinet." Id. art. 6(2).

⁴⁴⁷ Constitutional Court Act, Act No. 4017, Aug. 5, 1988, art. 6(1), amended by Act No. 7622, July 29, 2005 (S. Kor.), translated in 1 STATUTES OF THE REPUBLIC OF KOREA, *supra* note 441.

⁴⁴⁸ MINGUO XIANFA ZENGXIU TIAOWEN art. 5 (2005) (Taiwan).

	Japan	South Korea	Taiwan	Hong Kong	United States
Eligibility requirements for justices	None	Must be at least 40 years old and have at least 15 years of experience as (1) judge, prosecutor, or attorney; (2) a public or private employee in a "law-related area" with a license to practice law; or (3) a legal academic of assistant professor rank or higher at an accredited university with a license to practice law ⁴⁴⁹	Must fall in one of five categories: (1) Supreme Court justice with 10+ years experience; (2) legislator with 9+ years experience; (3) law professor with 10+ years experience; (4) served on ICJ "or have published authoritative works in the fields of public or comparative law"; (5) be "highly reputed in the field of legal research and have political experience"; no more than 1/3 of all justices may be drawn from any given category ⁴⁵⁰	PJ: (1) Sitting local judge, or (2) barrister with 10+ years of local experience HKNPJ: (1) Retired local judge, or (2) barrister with 10+ years of local experience ⁴⁵¹ ONPJ: active or retired judge from "another common law jurisdiction" who is "ordinarily resident outside Hong Kong" ⁴⁵²	None

⁴⁴⁹ Constitutional Court Act, Act No. 4017, Aug. 5, 1988, art. 5(1) (S. Kor.), translated in 1 STATUTES OF THE REPUBLIC OF KOREA, *supra* note 441; *see* CONSTITUTIONAL COURT OF KOREA, *supra* note 441, at 110.

⁴⁵⁰ Ssu Fa Yuan Tsu Chih Fa [Organic Act of the Judicial Yuan], art. 4, para. 1, 37 ZHONGHUA MINGUO XIANXING FAGUI HUIBIAN 25399, 25400 (1957) (Taiwan); *see* Law & Chang, *supra* note 11, at 545–46 n.93 (discussing the statutory eligibility requirements for appointment to the TCC). In practice, law professors have comprised a majority of the court because they have been appointed under multiple categories. *See id.* at 546; *supra* note 202.

⁴⁵¹ Hong Kong Court of Final Appeal Ordinance, (1997) Cap. 484, 4, § 12(3) (H.K.). Sitting members of the Court of Appeal are also eligible for appointment as non-permanent justices. *Id.*

⁴⁵² *Id.* § 12(4).

	Japan	South Korea	Taiwan	Hong Kong	United States
Use of merits panels	Most cases decided by petty bench of 5 justices; major cases decided by grand bench of all 15 justices	No panels	No panels	Cases decided by a panel of 5, usually consisting of the Chief Justice, 3 PJ, and 1 ONPJ	No panels
Clerks assigned to each justice	None	3-5 (2 permanent clerks and 1.5 temporary clerks on loan from the Supreme Court and Ministry of Justice)	1	None; may be introduced on a trial basis	4 ⁴⁵³
Shared clerks	37	(1) 25-30 permanent clerks (2) 5-10 temporary clerks from various agencies (3) 5-7 researchers specializing in foreign law	None	Varies; expanding from 5 to 8	None
Clerk experience	High	High	Medium	Low	Low

⁴⁵³ See TODD C. PEPPERS, COURTIER OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK 31 (2006) (observing that the number of law clerks per justice has risen from two to four over the last fifty years); ARTEMUS WARD & DAVID L. WEIDEN, SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT 23 tbl.1.1 (2006) (summarizing the evolution of the Supreme Court's use of law clerks).

	Japan	South Korea	Taiwan	Hong Kong	United States
Specialized clerks	Yes: all clerks are divided into 3 teams (civil, criminal, and administrative) ⁴⁵⁴	Yes: shared clerks are divided into 3 teams (civil/political rights, economic/property rights, and social welfare rights) ⁴⁵⁵	None	None	None
Career judges on court	6/15	7/9	5/15	None	None
Academics on court	2/15	0/9	8/15	PJ: 1/4 HKNPJ, ONPJ: 0/18	4/9
Interaction with foreign courts and judges	Medium	High	Low	High	High
Dedicated mechanism(s) for foreign legal research	None	(1) Researchers hired for their doctoral-level expertise in foreign law (2) Professors assigned to clerk teams (3) Dedicated "Constitutional Research Institute" (4) Network of foreign correspondents	None	None	None

⁴⁵⁴ Law, *supra* note 79, at 1579.

⁴⁵⁵ Prior to early 2013, the shared Constitutional Research Officers were divided into four teams (public benefits, criminal, economic rights, and political rights). See Telephone Interview with Unnamed Official, Constitutional Court of the Republic of Korea (Aug. 29, 2013).

	Japan	South Korea	Taiwan	Hong Kong	United States
Foreign-trained justices	2/15 US: 2	4/9 US: 3 Germany: 1	11/15 ⁴⁵⁶ Germany: 7 US: 4 Japan: 2 China: 1 ⁴⁵⁷	PJ: 4/4 (UK) ONPJ: 1/1 (UK, Australia, or New Zealand)	0/9
Foreign law usage by parties and/or their attorneys	Low	Law firms tend to hire foreign law experts for cases that receive oral argument (i.e., high-profile cases)	Low	High	Low
Foreign-trained clerks	Roughly half, including at least one German-trained and one French-trained clerk	Majority (1) Clerks are eligible for court-sponsored overseas study (2) Additional researchers are hired specifically for their expertise in foreign law (3) Research Institute personnel all have foreign training	Most	Majority UK: 2/5 Australia: 1/5	None

⁴⁵⁶ Justice Beyue Su obtained an M.B.A. in the United States and subsequently served as a chief financial officer at an American company. See *Justices of the Constitutional Court*, JUD. YUAN, http://www.judicial.gov.tw/constitutionalcourt/en/poi_03_01.asp?curno=125 (last visited Feb. 28, 2015), archived at <http://perma.cc/P3HR-6TAD>. She is included in the count of eleven foreign-trained justices. *Id.*

	Japan	South Korea	Taiwan	Hong Kong	United States
Foreign-trained constitutional scholars at elite law schools	University of Tokyo: 1/4 (25%) Keio University: 4/6 (66%) Waseda University: 4/8 (50%) ⁴⁵⁸	Seoul National University: 6/6 (100%) Korea University: (83%) Yonsei University: (100%)	National Taiwan University: 8/8 (100%)	University of Hong Kong: 10/10 (100%) Chinese University of Hong Kong: 8/8 (100%) City University of Hong Kong: 3/3 (100%)	Harvard: 2/28 (7%) Stanford: 1/16 (6%) Yale: 2/19 (11%)
Foreign law citation	5% ⁴⁵⁹	5-10%	Majority opinions: 1-2% Separate opinions: 13-22% ⁴⁶⁰	100%	Less than 0.3% ⁴⁶¹
Foreign law research	Occasional	Automatic	Automatic	Automatic	Rare

⁴⁵⁸ As of this writing, all three of the Japanese universities listed in the table possess both graduate law schools and undergraduate law faculties. The figures reported in this table reflect the total number of constitutional law professors across both the graduate and undergraduate programs. For a breakdown of the graduate versus undergraduate faculty at each school, see note 382 above.

⁴⁵⁹ See Ejima, *supra* note 71, at 277, 283 (counting 11 cases in which foreign law was cited, out of a total of 234 constitutional cases decided from 1990 through mid-2008).

⁴⁶⁰ Law & Chang, *supra* note 11, at 557.

⁴⁶¹ This count reflects citations to foreign cases in constitutional decisions rendered by the Rehnquist and Roberts Courts as of 2010. See Sperti, *supra* note 16, at 405.

	Japan	South Korea	Taiwan	Hong Kong	United States
Acceptance of foreign law usage	High	High	High	High	Low
Constitutional provision(s) addressing judicial usage of foreign or international law	None	None	None	(1) Courts may "refer to precedents of other common law jurisdictions" ⁴⁶² (2) Courts must apply "common law" that was "previously in force" under British rule ⁴⁶³ (3) ICCPR, ICESCR, and "international labour conventions" "remain in force" ⁴⁶⁴ (4) Foreign judges permitted ⁴⁶⁵	None
Jurisdictions most frequently considered	U.S. Germany ECtHR (rising)	Germany U.S. Japan (high but declining) ECtHR (low but rising) France (legislation, not case law)	Germany U.S. Austria Japan (declining) ECtHR (rising) Korea (low but rising) France (rare) Switzerland (rare)	U.K. Canada U.S. Australia New Zealand ECtHR South Africa (rare)	N/A

⁴⁶² XIANGGANG JIBEN FA art. 84 (H.K.).

⁴⁶³ *Id.* arts. 8, 87.

⁴⁶⁴ *Id.* art. 39.

⁴⁶⁵ *Id.* arts. 82, 84.